DOCKET

No. 13-6827

Title:	Gregory Houston Holt, aka Abdul Maalik Muhammad, Petitioner
	v.
	Ray Hobbs, Director, Arkansas Department of Correction, et al.
Docketed:	October 10, 2013
Linked with 13A374	
Lower Ct:	United States Court of Appeals for the Eighth Circuit
Case Nos.:	(12-3185)
Decision Date:	June 12, 2013
Rehearing Denied:	July 17, 2013

Questions Presented

--- Date---	------- Proceedings and Orders----------
Sep 27 2013	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due November 12, 2013)
Oct 11 2013	Application (13A374) for an injunction pending disposition of the petition for a writ of certiorari, submitted to Justice Alito.
Oct 16 2013	Response to application (13A374) requested by Justice Alito. (Due Thursday, October 24, 2013, by 4 p.m. EDT.)
Oct 24 2013	Response to application from respondent Ray Hobbs, Director, Arkansas Department of Correction, et al. filed.
Oct 29 2013	Waiver of right of respondents Ray Hobbs, Director, Arkansas Department of Correction, et al. to respond filed.
Oct 31 2013	DISTRIBUTED for Conference of November 15, 2013.
Nov 1 2013	Response Requested . (Due December 2, 2013)
Nov 14 2013	Application (13A374) referred to the Court.
Nov 14 2013	Application (13A374) granted by the Court. The application for an injunction submitted to Justice Alito and by him referred to the Court is granted pending disposition of applicants petition for a writ of certiorari. Respondents are enjoined from enforcing the Arkansas Department of Corrections grooming policy to the extent that it prohibits applicant from growing a one-half-inch beard in accordance with his religious beliefs. If the Court denies the petition for a writ of certiorari, this order shall terminate automatically. If the Court grants the petition for a writ of certiorari, this order shall terminate when the Court enters its judgment.
Nov 21 2013	Order extending time to file response to petition to and including January 16, 2014.
Jan 3 2014	Supplemental brief of petitioner Gregory Houston Holt, aka Abdul Maalik Muhammad

	filed.
Jan 16 2014	Brief of respondents Ray Hobbs, Director, Arkansas Department of Correction, et al. in opposition filed.
Jan 30 2014	DISTRIBUTED for Conference of February 21, 2014.
Feb 4 2014	Reply of petitioner Gregory Houston Holt, aka Abdul Maalik Muhammad filed. (Distributed)
Feb 24 2014	DISTRIBUTED for Conference of February 28, 2014.
Mar 3 2014	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Mar 3 2014	The order granting the petition for a writ of certiorari is amended as follows: The motion of petitioner for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted limited to the following question: Whether the Arkansas Department of Corrections grooming policy violates the Religious Land Use and Institutionalized Persons Act of 2000, 42 U. S. C. 2000cc et seq., to the extent that it prohibits petitioner from growing a one-half-inch beard in accordance with his religious beliefs..
Apr 1 2014	The time to file the joint appendix and petitioner's brief on the merits is extended to and including May 22, 2014.
Apr 1 2014	The time to file respondents' brief on the merits is extended to and including July 23, 2014.
Apr 15 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondents.
Apr 21 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.
Apr 23 2014	Joint appendix filed. (Statement of costs filed)
May 22 2014	Brief of petitioner Gregory Houston Holt, aka Abdul Maalik Muhammad filed.
May 29 2014	Brief amicus curiae of the United States filed.
May 29 2014	Brief amici curiae of Anti-Defamation League, et al. filed.
May 29 2014	Brief amici curiae of American Jewish Committee, et al. filed.
May 29 2014	Brief amici curiae of Former Corrections Officials John Clark, et al. filed.
May 29 2014	Brief amici curiae of Former Prison Wardens filed.
May 29 2014	Brief amicus curiae of Americans United for Separation of Church and State filed.
May 29 2014	Brief amicus curiae of Alliance Defending Freedom filed.
May 29 2014	Brief amici curiae of National Congress of American Indians and Huy filed.
May 29 2014	Brief amicus curiae of National Jewish Commission on Law and Public Affairs filed.
May 29 2014	Brief amici curiae of The Sikh Coalition and Muslim Public Affairs Council filed.
May 29 2014	Brief amici curiae of Prison Fellowship Ministries, et al. filed.
May 29 2014	Brief amici curiae of Dr. Ronald L. Akers, et al. filed.
May 29 2014	Brief amici curiae of International Mission Board of the Southern Baptist Convention, et al. filed.
May 29 2014	Brief amici curiae of Islamic Law Scholars filed.
May 29 2014	Brief amicus curiae of Women's Prison Association filed.
May 29 2014	Brief amicus curiae of The Rutherford Institute filed.
May 29 2014	Brief amici curiae of Reformed Prisoners Jesse Wiese, et al. filed.
Jun 9 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.

Jul 9 2014	Record requested from U.S.C.A. 8th Circuit.
Jul 16 2014	SET FOR ARGUMENT ON Tuesday, October 7, 2014
Jul 23 2014	Brief of respondents Ray Hobbs, Director, Arkansas Department of Correction, et al. filed.
Jul 30 2014	Brief amici curiae of Alabama, et al. filed.
Aug 7 2014	CIRCULATED.
Aug 13 2014	Record received from U.S.C.A. 8th Circuit. 1-Envelope. The full record is located on PACER.
Aug 15 2014	Record received from U.S.D.C. Eastern District of Arkansas Pine Bluff Division, 1 Envelope.
Aug 22 2014	Reply of petitioner Gregory Houston Holt, aka Abdul Maalik Muhammad filed. (Distributed)
Aug 22 2014	Proposal to lodge copies of two exhibits from an evidentiary hearing before the magistrate from counsel for petitioner.
Aug 22 2014	Proposal to lodge copies of responsive documents to extra-record representations made in respondents' brief on the merits from counsel for the petitioner.
Aug 26 2014	Letter from counsel for respondents in response to petitioner's lodging proposals.
Aug 29 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 7 2014	Argued. For petitioner: Douglas Laycock, Charlottesville, Va.; and Anthony A. Yang, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondents: David A. Curran, Deputy Attorney General, Little Rock, Ark.

PETITION FOR WRIT OF CERTIORARI

13-6827

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Gregory Holt (aka Abdul Maalik Muhammad)

Gregory Holt — PETITIONER
(Your Name)

vs.

Ray Hobbs, et al. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Eighth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Gregory Holt (Abdul Maalik Muhammad)
(Your Name)

Varner Supermax, P.O. Box 600
(Address)

Grady, AR 71644-0600
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

I. Whether the Arkansas Department of Corrections' no beard grooming policy violates the Religious Land Use and Institutionalized Persons Act (RLUIPA).

II. Whether a 1/2 inch beard would satisfy the security goals sought by the policy.

III. Whether the no beard grooming policy violates Petitioner's First Amendment right to practice Islam as he believes it is supposed to be practiced by the wearing of the beard.

IV. That the United States Court of Appeals for the Eighth Circuit has decided that the no beard grooming policy does not violate the RLUIPA, but this Court should decide the matter since it has not done so and should rule whether grooming polices of any Department of Correction that do not allow for a religious exception exemption are constitutional.

V. That the United States Court of Appeals for the Eighth Circuit's decision in this case conflicts with other circuit's rulings on the matter.

VI. That the ADC grooming policy of no beards is not the least restrictive means of achieving the desired objective of staunching the flow of contraband and identifying prisoners in the event of an escape.

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[✓] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

(1) Capt. Donald Tate
(2) Chief Deputy Director Larry May
(3) Sgt. Michael Richardson
(4) Warden Gaylon Lay
(5) Major Vernon Robertson

TABLE OF AUTHORITIES CITED

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[✓] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was June 19, 2013.

[ ] No petition for rehearing was timely filed in my case.

[✓] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: July 17, 2013, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from state courts:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendment I to the United States Constitution which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Amendment is enforced by the Religious Land Use and Institutionalized Persons Act (RLUIPA), Title 42 U.S.C.A. Section 2000cc:

(a) Substantial burdens

(1) General rule

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application

This subsection applies in any case in which—

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability

STATEMENT OF THE CASE

Petitioner challenged the Arkansas Department of Corrections' no beard grooming policy due to his beliefs that all Muslim males are not to shave their beards. He asked for a Preliminary Injunction and Temporary Restraining order that would allow him to maintain a 1/2 inch beard while the case was heard. This was granted on October 19, 2012. An evidentiary hearing was held on Jan 4, 2012. The magistrate recommended that the injunctive relief be denied and the case dismissed on January 27, 2012. The district court vacated the injunction and dismissed the case on March 23, 2012. Rehearing was granted and a stay was issued on April 19, 2012 that once again allowed Petitioner to maintain a 1/2 inch beard while the Eighth Circuit Court of Appeals heard the case. On June 12, 2013, the Eighth Circuit denied relief and rehearing was denied on July 17, 2013. From that denial, this petition originates.

Petitioner maintains that Respondents did not use the least restrictive means under the RLUIPA when refusing to grant Petitioner a religious exception exemption to the policy and refusing to allow him to wear a 1/2 inch beard, and that Respondents' no beard policy is violative of the RLUIPA. Petitioner also believes the Eighth Circuit Court of Appeals erred in finding that a 1/2 inch beard is not the least restrictive means of achieving the security goals sought by the policy.

Petitioner believes that the issues raised are sufficient for at least 4 justices to vote to grant certiorari. This Court has never ruled on whether the failure to grant a religious exception exemption to a grooming policy violates the First Amendment and the RLUIPA.

REASONS FOR GRANTING THE PETITION

A. Conflicts with Decisions of Other Courts

The holding of the court below that the grooming policy is in keeping with the Religious Land Use and Institutionalized Persons Act (RLUIPA) and that a 1/2 inch beard is not a suitable compromise conflicts with 3 different Courts of appeal. In Mayweathers vs. Newland, (258 F.3d 930, 2001) the 9th Circuit Court of Appeals upheld a finding that California Department of Corrections' no-beard policy violated the Plaintiff's religious rights under the Religious Land Use and Institutionalized Persons Act and upheld a preliminary injunction that allowed the wearing of 1/2 inch beards. This Court refused to review that finding. (Alameida vs. Mayweathers, cert denied, 540 U.S. 815, 2003) Also, Warsoldier vs. Woodford, 418 F.3d 989, 9th Cir. 2005. In addition, Petitioner points to the following cases from other circuits that all show that the forcing of inmates to shave against their religious beliefs or to adhere to a grooming policy in contravention of those beliefs was a "substantial burden" within the meaning of the RLUIPA or the First Amendment. (Benjamin vs. Coughlin, 905 F.2d 571, 2nd Cir. 1990); (Smith vs. Ozmint, 578 F.3d 246, 4th Cir. 2009); (Mayweathers vs. Terhune, 328 F.Supp.2d 1086, E.D. California, 2004) The Eighth Circuit erred in so finding that the grooming policy does not violate the RLUIPA.

B. Importance Of The Questions Presented

(I) This Court should visit this issue due to the fact that it has the potential to affect thousands of inmates. There are many different religious beliefs, besides Islam, that require their adherents to either maintain a beard or not to "round the corners" of the beard. The Arkansas Department of Corrections'

grooming policy ("no beard" rule) as well as all of those of other Departments of Correction that do not allow for religious exception exemptions to their grooming policies are intolerably oppressive and force inmates to either obey their religious beliefs and face disciplinary action on the one hand or violate those beliefs in order to acquiesce with the grooming policy. This Court has held that punishments to coerce a religious adherent to forgo her or his religious beliefs is an infringment on religious exercise (Sherbert vs. Verner, 374 U.S. 398, 1963) Therefore, given the magnitude of the issue involved, this Court should grant review. Additionally, the failure of the Department of Correction to allow a religious exception to its grooming policy is unconstitutional and violative of the RLUIPA.

(III) The RLUIPA requires that an individualized review be performed in the event that an inmate requests a religious exception exemption to the grooming policy, (Koger vs. Bryan, 523 F.3d 789, 7th Cir. 2008) [noting that RLUIPA, unlike the Free Exercise Clause of the Constitution, requires individualized review]; (Spratt vs. R.I. Dept of Corrections, 482 F.3d 33, 1st Cir. 2007) [rejecting the prison's "all or nothing" argument and finding that the prison "must establish that prison security is furthered by barring the individual from engaging in" the disputed conduct] This was not done in this case or in the case that the Eighth Circuit relied on in denying Petitioner's request. (Fegans vs. Norris, 537 F.3d 897, 8th Cir. 2008). In Murphy vs. Mo. Dept. of Corr., 372 F.3d 979, 8th Cir. 2004, the Eighth

Circuit remanded a case back to the district court because the prison had failed to demonstrate that it had "seriously considered any other alternatives" to a regulation alleged to infringe on prisoner's free exercise of religion. 372 F.3d at 989. Prison officials cannot "justify restrictions on religious exercise by simply citing to the need to maintain order and security in a prison; they must demonstrate that they actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice" (Alvarez vs. Hill, 518 F.3d 1152, 9th Cir. 2008) The Respondents have the burden of proving that the grooming policy is the least restrictive means to achieve security as applied to Petitioner (42 U.S.C. Section 2000cc-1(a) (providing that prisons cannot "impose a substantial burden on the religious exercise of a person residing in an institution even if the burden results from a rule of general applicability") See also United States vs. Playboy Entertainment Group, Inc., 529 U.S. 803, 824, 2000 (finding in context of First Amendment challenge to speech restrictions that a court should not assume a plausible, less restrictive alternative would be ineffective) As demonstrated above, the Respondents have failed to establish that they have considered less restrictive means to the grooming policy and failed to prove that a 1/2 inch beard would not be the least restrictive means to achieve the security goals sought by the policy. Cert review should be granted on this point.

(III.) Other Department of Corrections are able to

meet valid penological goals of security without a grooming policy or a religious exemption to a grooming policy. Petitioner provided information about other state DOC grooming regulations to both the district court and the Eighth Circuit Court of Appeals. Prisons run by the federal government, Oregon, Colorado, Nevada, California, and New York all meet the same penological goals claimed by Arkansas, but without a grooming policy or, in the alternative a religious exemption to the policy. Nevada permits inmates "freedom in personal grooming" (Nevada Department of Corrections Admin. Reg. 705.01[1.1]) Colorado's Department of Corrections expressly provides for a religious exemption to its grooming regulations (Colorado Admin. Reg. 850-11 (I)) (IV)(A)(1)(d)). Oregon merely requires that an inmate's "head and facial hair be maintained in a clean and neat manner." (Oregon Admin. R. Section 291-123-0015 (2)(a)) California allows its Muslim inmates to grow 1/2 inch beards. (California Code Regs. Title 15 Section 3287(b)) New York allows for the growth of a 1 inch beard pursuant to Directive 4914. Nor does the Federal Bureau of Prisons impose any mandatory restrictions on its inmates facial hair. (Federal Bureau of Prisons, Program Statement 5230.05 Section 551.4) In fact, only 9 states have grooming policies and all, interestingly enough, are in the South. If 41 other states and the Bureau of Prisons can still meet valid penological goals

without grooming policies, or if those policies exist, religious exemptions - then the Arkansas Department of Correction can do the same by the wearing of 1/2 inch beards. They already allow inmates with certain dermatological conditions to maintain 1/4 inch beards, so it is not too far of a stretch to allow 1/2 inch beards for religious purposes, (Arkansas Dept. of Correction Administrative Directive 98-04). In the January 4, 2012 evidentiary hearing, Respondent Warden Gaylon Lay could not recall any escapes in recent memory that involved beards and he further testified that contraband flow at the Cummins Unit had <u>increased</u> from 2006-2012 all while the current grooming policy was in place. A 1/4 to 1/2 inch beard would not sufficiently hide the contours of the face in the event of an escape. In fact, the 9th Circuit and the Eastern District of California have ruled as much (<u>Mayweathers vs. Terhune</u>, 328 F.Supp.2d 1086, 2004) So have other circuits (<u>Ross vs. Coughlin</u>, 669 F.Supp. 1835, 2nd Cir.); (<u>Framer vs. Scully</u>, 874 F.2d 69). If the security goals of the Arkansas Department of Correction are not compromised by allowing certain inmates to maintain 1/4 inch beards for medical reasons, then neither is the wearing of 1/2 inch beards for religious reasons. The Court should grant certiorari on this question.

IV) Other less restrictive means have been offered that would allay the concerns of the Respondents to various security concerns. They are as follows:

[A] Daily visual inspection of beard growth

[B] Direct orders for inmates to get into compliance with the 1/2 inch rule or face disciplinary action.

[C] Religious barber calls once a week.

[D] Directing inmates to run their hands through their facial hair upon command by staff to inspect for contraband

[E] Running the handheld metal detector over the facial area in a "wave" as is done on the clothed body of inmates, to detect contraband of a metallic nature.

[F] Taking photographs of clean shaven inmates upon admittance to the ADC and then rephotographing the inmate with a 1/2 inch beard. This is done in both New York and California.

[G] Providing a standard photograph to be placed in all barracks at all ADC institutions that shows the allowable 1/2 inch length.

The failure of the Respondents to consider and implement the above shows that they never attempted to use the "least restrictive means" in addressing the wearing of 1/2 inch beards. The Respondents never established what, if any, modes of regulation it considered and rejected as it relates to a 1/2 inch beard, or to the alternatives proffered. Assuming that the Respondents have met their evidentiary

burden and that they have established that the grooming policy of not allowing beards serves a compelling governmental interest, it still must establish that the grooming policy of not allowing 1/2 inch beards is the least restrictive alternative to achieve that interest, see 42 U.S.C. Section 2000cc-1(a) and 42 U.S.C. Section 2000cc-(a)(b)

In attempting to meet its burden, Respondents present conclusory statements that the grooming policy is the least restrictive means to ensuring prison security. Indeed, the failure of the Respondent to explain why another institution with the same compelling interests was able to accomodate the same religious practices may constitute a failure to establish that the Respondents were using the least restrictive means. (see Cheema vs. Thompson, 67 F.3d 883, 1995) (finding fault with defendant's failure to explain fact that another school district had managed to accomodate Sikh students' religious practices without sacrificing school safety). The Respondents failure to do so violates the RLUIPA and the Court should grant certiorari on this issue.

V. The no beard grooming policy violates Petitioner's First Amendment rights to practice Islam as he believes it is supposed to be practiced by the wearing of the beard, Petitioner is a devout, Salafi Muslim that follows the Sunnah of the Prophet Muhammad and the

Salaf of the righteous predecessors, As part of this belief and practice, Petitioner believes that every Muslim male is to wear a lihyat (beard) by "clipping the mustaches short and leaving the beard as it is" (emphasis mine) [Sahih Al-Bukhari, Volume 7, Hadith 5893]. The importance of wearing a beard and not shaving it is stressed in the listing of hadith on the matter found in Appendix E. The Prophet (saws) has stated that those who do not practice "what me and my companions (sahaba) are on are not of us." What did he (saws) mean by this? He (saws) meant the Salaf of the rightly guided predecessors and the Sunnah of the Prophet (saws). He (saws) further stated that "the time would come and there would emerge from the East people who will recite the Qur'an but it will not exceed their throats and who will go out of (renounce) the religion (Islam) as an arrow passes through the game." The people asked, "What will their signs be?" He said, "Their sign will be the habit of shaving (of their beards)" (Sahih Al-Bukhari 9:651, Narrated Abu Sa'id Al-Khudri and Fateh Al-Bari, Page 322, Vol. 17) This is so important and no man made law can order a Muslim to shave his beard in

contravention of the laws of Allah (swta). A Muslim is obligated to disobey such a law, forcibly if necessary, because then such a law becomes oppression and Allah (swta) has laid out clear cut guidelines for how a Muslim is to confront an oppressor. Therefore, any law propagated by the Respondents to force Petitioner to violate his beliefs is in violation of the First Amendment and is violative of the Religious Land Use and Institutionalized Persons Act (RLUIPA). Additionally, Petitioner's alternatives of religious expression are severely limited in the Supermax. For example, there are no group worship services, sajadahs (prayer rugs) are not allowed, there is extremely limited access to an Islamic spiritual advisor constituting no real meaningful access, Islamic publications are limited and Islamic catalogs are classified as books that, should they exceed the 10 book total limit, are subject to confiscation and there are no alternatives to religious instruction. The Supermax just started allowing Muslim inmates to participate once again in the Eid feasts individually after Petitioner grieved the matter and threatened litigation. Therefore, Petitioner needs an alternative form of

religious expression and maintaining a 1/2 inch beard would be a suitable alternative. The Court should grant certiorari on this matter based on the foregoing. This is a matter of grave importance, pitting the rights of Muslim inmates against a system that is hostile to these views. It can affect thousands of inmates and is creating unnecessary tension between Muslims and their keepers. The system should be forced to respect Islamic practices and Muslims should not be forced to make choices affecting their eternal future. The other DOCs and the Bureau of Prisons who have no grooming policies are working just fine controlling contraband flow and preventing escapes. A 1/2 inch beard would not be a security threat when inmates are allowed to grow large afros and thick head hair. In the end, it is not about security issues but rather about controlling inmates unnecessarily by interfering with their religious practices. This Court should grant certiorari and reverse and remand this case for a trial on the merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Abdul Maalik Muhammad

Gregory Holt

Date: 9-10-13

United States Court of Appeals
For the Eighth Circuit

No. 12-3185

Gregory Houston Holt, also known as Abdul Maalik Muhammad

Plaintiff - Appellant

v.

Ray Hobbs, Director, Arkansas Department of Correction; Gaylon Lay, Warden, Cummins Unit, ADC; D W Tate, Captain, Cummins Unit, Arkansas Department of Correction; V. R. Robertson, Major, Cummins Unit, Arkansas Department of Correction; M. Richardson, Sgt., Cummins Unit, Arkansas Department of Correction; Larry May, Chief Deputy Director, Arkansas Department of Correction

Defendants - Appellees

Appeal from United States District Court
for the Eastern District of Arkansas - Pine Bluff

Submitted: June 6, 2013
Filed: June 12, 2013
[Unpublished]

Before BYE, ARNOLD, and SHEPHERD, Circuit Judges.

PER CURIAM.

Appendix A

In this action challenging the Arkansas Department of Correction (ADC) grooming policy under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1(a)(1)-(2), inmate Gregory Holt (also known as Abdul Maalik Muhammad) appeals the district court's[1] order dismissing his action after an evidentiary hearing.

In his complaint and motion for a preliminary injunction and temporary restraining order, Mr. Holt asserted that one of his fundamentalist Muslim beliefs was that he must grow a beard, but defendants substantially burdened his ability to practice his religion by enforcing ADC's grooming policy, which allowed trimmed mustaches but otherwise no facial hair, with quarter-inch beards permitted only for a diagnosed dermatological problem. Mr. Holt sought permission to maintain a half-inch beard as a compromise position, to balance his religious beliefs with ADC's security needs. The district court initially granted temporary injunctive relief. The court vacated its order and dismissed the complaint, however, after the hearing produced evidence that Mr. Holt had a prayer rug and a list of distributors of Islamic material, he was allowed to correspond with a religious advisor, and he was allowed to maintain the required diet and observe religious holidays; that the grooming policy helped prevent inmates from concealing contraband, drugs, or weapons; that an inmate who grew a beard could change his appearance quickly by shaving; that affording special privileges to an individual inmate could result in his being targeted by other inmates; and that prison officials believed the grooming policy was necessary to further ADC's interest in prison security.

Following careful review, see Johnson v. Bi-State Justice Ctr., 12 F.3d 133, 135 (8th Cir. 1993) (where judgment is granted after evidentiary hearing, standard is

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[1]The Honorable Brian S. Miller, Chief Judge, United States District Court for the Eastern District of Arkansas, adopting the report and recommendations of the Honorable Joe J. Volpe, United States Magistrate Judge for the Eastern District of Arkansas.

whether evidence presents sufficient disagreement to require submission to jury or is so one-sided that one party must prevail), we conclude that defendants met their burden under RLUIPA of establishing that ADC's grooming policy was the least restrictive means of furthering a compelling penological interest, see Fegans v. Norris, 537 F.3d 897, 903 (8th Cir. 2008) (absent substantial evidence in record indicating that response of prison officials to security concerns is exaggerated, courts should ordinarily defer to their expert judgment in such matters), notwithstanding Mr. Holt's citation to cases indicating that prisons in other jurisdictions have been able to meet their security needs while allowing inmates to maintain facial hair, see id. at 905 (although prison policies from other jurisdictions provide some evidence as to feasibility of implementing less restrictive means of achieving prison safety and security, it does not outweigh deference owed to expert judgment of prison officials who are more familiar with their own institutions).

Accordingly, we affirm, but we modify the judgment to reflect that the dismissal does not count as a "strike" for purposes of 28 U.S.C. § 1915(g).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

GREGORY HOLT (Abdul Maalik Muhammad)
ADC #129616 **PLAINTIFF**

v. **CASE NO. 5:11CV00164 BSM**

RAY HOBBS, Director,
Arkansas Department of Correction, et al. **DEFENDANTS**

ORDER

The proposed findings and recommended disposition submitted by United States Magistrate Judge Joe J. Volpe [Doc. No. 82] and the filed objections [Doc. No. 86] have been reviewed. After carefully considering this document and making a *de novo* review of the record, it is concluded that the proposed findings and recommended disposition should be, and hereby are, approved and adopted in their entirety in all respects.

Holt's motion for an emergency hearing [Doc. No. 89] is denied. In his motion, Holt states that he has been placed in administrative segregation in retaliation for filing the present suit challenging the Arkansas Department of Correction's (ADC) grooming policy. Doc. No. 89 at ¶ 1. Holt admits that he was initially placed in administrative segregation upon his own request. [Doc. No. 87] at ¶ 2. Holt also admits that upon his request to be released from administrative segregation, his request was denied based on actions he had taken in violation of ADC policy, including sending a threatening letter to a local police department. *Id.* at ¶ 3. *See* Doc. 84-1. "It is well established that prisoners have narrowly defined liberty interests, for imprisonment necessarily retracts many of the liberties of the free. Among the liberties

Appendix B

which prisoners do not enjoy is choice of cells. Transfer within the prison, or to another prison, is within the discretion of prison officials." *Lyon v. Farrier*, 727 F.2d 766, 768 (8th Cir. 1984). Therefore, Holt's motion for an emergency hearing [Doc. No. 89] is denied.

IT IS THEREFORE ORDERED that:

1. Holt's complaint [Doc. No. 2] be dismissed with prejudice for failure to state a claim on which relief can be granted.

2. Dismissal of this action constitutes a "strike" for purposes of 28 U.S.C. § 1915(g).

3. Holt's motion for an emergency hearing [Doc. No. 89] is denied.

4. All remaining pending motions are denied as moot.

An appropriate judgment shall accompany this order.

IT IS SO ORDERED this 23rd day of March 2012.

Brian S. Miller
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 12-3185

Gregory Houston Holt, also known as Abdul Maalik Muhammad

Appellant

v.

Ray Hobbs, Director, Arkansas Department of Correction, et al.

Appellees

Appeal from U.S. District Court for the Eastern District of Arkansas - Pine Bluff
(5:11-cv-00164-BSM)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 17, 2013

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

GREGORY HOLT, ADC # 129616
a/k/a ABDUL MAALIK MUHAMMAD — PLAINTIFF

v. 5:11-cv-00164-BSM-JJV

RAY HOBBS, Director, Arkansas
Department of Correction; *et al.* — DEFENDANTS

PROPOSED FINDINGS AND RECOMMENDATIONS

INSTRUCTIONS

The following recommended disposition has been sent to United States District Judge Brian S. Miller. Any party may serve and file written objections to this recommendation. Objections should be specific and should include the factual or legal basis for the objection. If the objection is to a factual finding, specifically identify that finding and the evidence that supports your objection. An original and one copy of your objections must be received in the office of the United States District Court Clerk no later than fourteen (14) days from the date of the findings and recommendations. The copy will be furnished to the opposing party. Failure to file timely objections may result in a waiver of the right to appeal questions of fact.

If you are objecting to the recommendation and also desire to submit new, different, or additional evidence, and to have a new hearing for this purpose before either the District Judge or Magistrate Judge, you must, at the time you file your written objections, include the following:

1. Why the record made before the Magistrate Judge is inadequate.

Appendix D

2. Why the evidence to be proffered at the new hearing (if such a hearing is granted) was not offered at the hearing before the Magistrate Judge.

3. The details of any testimony desired to be introduced at the new hearing in the form of an offer of proof, and a copy, or the original, of any documentary or other non-testimonial evidence desired to be introduced at the new hearing.

From this submission, the District Judge will determine the necessity for an additional evidentiary hearing. Mail your objections and "Statement of Necessity" to:

Clerk, United States District Court
Eastern District of Arkansas
600 West Capitol Avenue, Suite A149
Little Rock, AR 72201-3325

DISPOSITION

I. INTRODUCTION

Gregory Holt, also known as Abdul Maalik Muhammad, filed a *pro se* Complaint (Doc. No. 2) pursuant to 42 U.S.C. § 1983, alleging that the Arkansas Department of Correction (ADC) grooming policy violates his constitutional rights and the Religious Land Use and Institutionalized Persons Act (RLUIPA).[1] Mr. Muhammad is a Salafi Muslim who

---

[1]The Religious Land Use and Institutionalized Persons Act (RLUIPA), which will be discussed further in Section IV, provides that:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, . . . unless the government demonstrates that imposition of the burden on that person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1.

seeks to grow a beard in observance of his religion but in contravention to the ADC grooming policy. (Doc. No. 2.)

The undersigned magistrate judge previously recommended denial (Doc. No. 7) of Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order (Doc. No. 3) in light of the holding in *Fegans v. Norris*, 537 F.3d 897 (8th Cir. 2008) (Melloy, J., dissenting). Presiding District Judge Brian S. Miller, however, rejected those findings, granted Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order, and remanded the matter to the undersigned to hold a hearing.

On January 4, 2012, the Court held a hearing on the Motion for Preliminary Injunction and Temporary Restraining Order. After hearing testimony of two ADC officials concerning the specific rationale for the ADC grooming policy, this Court finds that the principles in *Fegans* apply and respectfully recommends that the Order granting Plaintiff's Motion (Doc. No. 28) be vacated and Plaintiff's Motion (Doc. No. 3) be DENIED. Furthermore, because one of the factors the Court considered in adjudication of Plaintiff's Motion was "the probability that the movant will succeed on the merits," this Court also finds that Mr. Muhammad's Complaint (Doc. No. 2) should be DISMISSED for failure to state a claim upon which relief may be granted.

II. FACTS

The ADC's grooming policy states:

> B. Inmates' hair must be worn loose, clean, and neatly combed. No extreme styles are permitted, including but not limited to corn rows, braids, dread locks, Mohawks, etc. The hair of male inmates must be cut so as to be above the ear, with sideburns no lower than the middle

> of the ear lobe and no longer in the back than the middle of the nape of the neck. Female inmates may wear their hair no longer than shoulder length.
>
> . .
>
> D. No inmates will be permitted to wear facial hair other than a neatly trimmed mustache that does not extend beyond the corner of the mouth or over the lip. Medical staff may prescribe that inmates with a diagnosed dermatological problem may wear facial hair no longer than one quarter of an inch. Inmates must present MSF 207 upon demand.

Administrative Directive 98-04 ("AD 98-04"). The purpose of the policy is "to provide for the health and hygiene of incarcerated offenders, and to maintain a standard appearance throughout the period of incarceration, minimizing opportunities for disguise and for transport of contraband and weapons." (*Id.*) An inmate's failure to comply with the grooming policy is grounds for disciplinary action. (*Id.*)

Mr. Muhammad offered a compromise and requested permission to maintain a one-half-inch beard in observance of his religion. Defendants rejected Mr. Muhammad's offer and argued that the grooming policy is necessary to alleviate security concerns.

III. PRELIMINARY INJUNCTION

A. Standard

In deciding whether to grant injunctive relief, the Court must consider the following factors: (1) the threat of irreparable harm to the movant; (2) the state of balance between the harm and the injury that granting the injunction will inflict on the other party litigants; (3) the probability that the movant will succeed on the merits; and (4) the public interest. *Dataphase Sys., Inc. v. C.L. Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (*en banc*). No single factor is dispositive, but the movant must establish a threat of irreparable harm. *Id.*

Without a finding of irreparable injury, a preliminary injunction should not be issued. *Randolph v. Rogers*, 170 F.3d 850, 856 (8th Cir. 1999). "The burden of proving that a preliminary injunction should be issued rests entirely with the movant." *Goff v. Harper*, 60 F.3d 518, 520-21 (8th Cir. 1995). The court in *Goff* also addressed the district court's role in inmate applications for injunctive relief as follows: "[I]n the prison context, a request for injunctive relief must always be viewed with great caution because 'judicial restraint is especially called for in dealing with the complex and intractable problems of prison administration'...[t]he courts should not get involved unless either a constitutional violation has already occurred or the threat of such a violation is both real and immediate." *Id.* (quoting *Rogers v. Scurr*, 676 F.2d 1211, 1214 (8th Cir. 1982)).

B. Analysis

As stated above, no single factor is dispositive; however, in this instance the two most important factors are whether Mr. Muhammad will suffer irreparable harm and the probability that he will succeed on the merits. During the hearing, Mr. Muhammad acknowledged that not all Muslims believe a man must maintain a beard. He also testified that followers of his faith get credit for attempting to follow the religious tenets. In light of Mr. Muhammad's hearing testimony, the Court finds that he will not suffer irreparable harm if forced to shave his beard in compliance with the ADC grooming policy.

Upon evaluating the balance between the harm to Mr. Muhammad and the injury that granting the injunction/temporary restraining order will cause the ADC, the Court finds that potential harm to the ADC outweighs any injury to Mr. Muhammad. During the hearing

ADC officials expressed concerns regarding safety and security. Warden Gaylon Lay, Cummins Unit, testified that if an inmate was allowed to maintain a beard, the inmate could change his appearance during an escape. He posed the questions of how does one consistently determine on a day-to-day basis whether an inmate's beard is one-half-inch long and what if the inmate disagreed with the assessment of his beard.

Warden Lay also expressed concern about beards being used as a means to facilitate the introduction of contraband into the inmate population. According to Warden Lay, a one-half-inch beard can conceal razor blades, drugs and homemade darts. He also expressed concern for the effect that giving one inmate preferential treatment would have on other inmates. He suggested that inmate could become a target of his fellow inmates.

The most compelling testimony came from ADC Assistant Director Grant Harris. He also explained that the mission of the ADC's grooming policy is to prevent the introduction of weapons and contraband into the prisons and that inmate facial hair poses a security risk. According to Harris, a needle from a syringe could be concealed in an inmate's beard. He was concerned that the officers charged with inspecting the inmates' beards might be wounded by needles or broken razors. He also echoed Warden Lays' concerns about giving an inmate preferential treatment. He stated that affording an inmate preferential treatment would either make the inmate a target or perhaps elevate the inmate's status to that of a leader.

Mr. Harris further testified that an emerging threat to security at the ADC was cellular telephones. The ADC telephone system helps minimize risk because it records all inmate

calls with the exception of legal calls. But inmates try to circumvent the phone system by smuggling in cell telephones piece by piece and reassembling them. He stated that a cell phone could be used to facilitate the introduction of drugs and weapons into the inmate population. During his testimony, Mr. Harris produced a ⅜" x ⅜" subscriber identify module (SIM) card from a cell phone. He explained that the SIM card was the critical piece to the cell telephone and, due to its size, a SIM card could be easily concealed in an inmate's beard.

Although Plaintiff makes compelling arguments that an inmate could easily hide contraband in many places other than a one-half-inch beard, the prison officials are entitled to deference. *Gladson v. Iowa Dep't of Corrs.*, 551 F.3d 825, 831-32 (8th Cir. 2009.) And the safety and security concerns advanced by the ADC officials are reasonable – particularly the fact that an escaping inmate could quickly change his appearance by shaving off his beard. Regardless, the concerns expressed by the ADC officials are nearly identical to those embraced by the majority in *Fegans*, 537 F.3d 897.

During the bench trial in *Fegans*, former ADC Director Larry Norris expressed concern regarding the safety and security of inmates and staff. *Id.* at 906. He explained that the ADC prohibition on inmate facial hair "keeps [inmates] from being able to change their appearance," and made it easier for law enforcement officials to track and identify an inmate following an escape. *Id.* at 906. He also said that "an uncut beard would make identification more difficult and would facilitate the smuggling of contraband. An uncut beard creates a better disguise for an escapee than a quarter-inch beard, because it conceals the contours of

an inmate's face." *Fegans*, 537 F.3d at 907. The *Fegans* majority agreed that the ADC had a legitimate penological interest in prohibiting inmates from wearing uncut beards and that the prohibition was the least restrictive means available in furthering that interest. *Id.* at 907.

Mr. Muhammad urges the Court to disregard *Fegans* and instead follow the *Mayweathers v. Terhune* case from the Ninth Circuit. *Mayweathers v. Terhune*, 328 F. Supp. 2d 1086 (E.D. Cal. 2004). The Court, however, is mindful of the fact that it is bound by Eighth Circuit precedent. *See Hood v. U.S.*, 342 F.3d 861, 864 (8th Cir. 2003). Because the testimony in the present case is similar to that offered in *Fegans*, the Court finds that Plaintiff has little likelihood of success on the merits.

The public interest in this matter is negligible and does not favor either party. In sum, upon considering the four factors, the Court finds that Mr. Muhammad will not suffer any irreparable harm, the balance the harm and the injury to ADC weighs in favor of the ADC, and based on Eighth Circuit precedent there is little likelihood that Mr. Muhammad will succeed on the merits. The Court, therefore, finds that Mr. Muhammed's Motion for Preliminary Injunction and Temporary Restraining Order (Doc. No. 3) should be DENIED.

IV. SCREENING

The Prison Litigation Reform Act requires federal courts to screen prisoner complaints seeking relief against a governmental entity, officer, or employee. 28 U.S.C. § 1915A(a). According to 28 U.S.C. § 1915(e)(2)(B) the court may dismiss a prisoner case at any time if the court determines that the prisoner's complaint is either frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant

who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B).

Here, the Court has convened a hearing and has considered Mr. Muhammad's testimony during the hearing to be true, drawn appropriate inferences in his favor, and refrained from making any credibility determinations. In considering "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986), the Court finds dismissal is appropriate in this case as a matter of law.

A. Standard

The court must dismiss a complaint or portion thereof if the prisoner has raised claims that: (a) are legally frivolous or malicious; (b) fail to state a claim upon which relief may be granted; or (c) seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B). An action is frivolous if "it lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). An action fails to state a claim upon which relief can be granted if it does not plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007). In reviewing a *pro se* complaint under § 1915(e)(2)(B), the court must give the complaint the benefit of a liberal construction. *Haines v. Kerner*, 404 U.S. 519, 520 (1972). The court must also weight all factual allegations in favor of the plaintiff, unless the facts alleged are clearly baseless. *Denton v. Hernandez*, 504 U.S. 25, 32 (1992); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). But regardless of whether a plaintiff is represented or appearing *pro se*, his

"complaint must contain specific facts supporting its conclusions." *See Martin v. Sargent*, 780 F.2d 1334, 1337 (8th Cir. 1985).

A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Twombly* at 556. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *See id.* Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility" of entitlement to relief. *Id.* at 557.

B. The Free Exercise Clause and RLUIPA

"It is well settled that a prison inmate retains those constitutional rights that are not inconsistent with his status as a prisoner or the legitimate penological objectives of the corrections system." *Turner v. Safley*, 482 U.S. 78, 95 (1987) (quoting *Pell v. Procunier*, 417 U.S. 817, 822 (1974)) (internal quotations omitted). The evaluation of penological objectives in this context is "committed to the considered judgment of prison administrators." *O'Lone v Shabazz*, 482 U.S. 342, 349 (1987); *Fegans*, 537 F.3d at 902. To ensure that courts afford appropriate deference to those judgments, courts review prison regulations alleged to infringe on constitutional rights under a "reasonableness test" that is less restrictive than ordinarily applied to alleged infringements of fundamental rights. *O'Lone*, 482 U.S. at 349; *Fegans*, 537 F.3d at 902.

A prison regulation or action is valid, even if it restricts a prisoner's constitutional rights, if it is "reasonably related to legitimate penological interest." *Gladson*, 551 F.3d at

832 (quoting *Turner*, 482 U.S. at 89). When determining whether a prison regulation or action is reasonably related to legitimate penological interests, the court considers the following factors: (1) whether there is a valid rational connection between the prison regulation and the government interest in justifying it; (2) whether there is an alternative means of exercising the right that remains open to prison inmates; (3) whether the accommodation will have a significant "ripple effect" on guards and other inmates and on the allocation of prison resources; and (4) whether there is an alternative that fully accommodates the prisoner at de minimis cost to valid penological interest. *Turner*, 482 U.S. at 90; *Gladson*, 551 F.3d at 831.

In 2000, Congress enacted RLUIPA to provide additional protection for institutionalized persons' religious freedom. *Singson v. Norris*, 553 F.3d 660, 662 (8th Cir. 2009); *Murphy v. Mo. Dep't of Corrs.*, 372 F.3d 979, 987 (8th Cir. 2004). RLUIPA provides that:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, unless the government demonstrates that imposition of the burden on that person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1. RLUIPA "defines 'religious exercise' to include 'any exercise of religion, whether or not compelled by, or central to, a system of religious beliefs.'" *Van Wyhe v. Reisch*, 581 F.3d 639, 655-56 (8th Cir. 2009) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005)). RLUIPA bars inquiry into whether a particular belief or practice is central to a prisoner's religion. *Gladson*, 551 F.3d at 832.

A prisoner's claim under RLUIPA is, instead, evaluated under a compelling interest standard. *Cutter*, 544 U.S. at 722; *Gladson*, 551 F.3d at 832; *Patel v. U. S. Bureau of Prisons*, 515 F.3d 807, 813 (8th Cir. 2008). The United States Supreme Court has remarked that "context matters" in the application of this "compelling government interest" standard, and that RLUIPA does not "elevate accommodation of religious observances over an institution's need to maintain order and safety." *Cutter*, 544 U.S. at 722; *Fegans*, 537 F.3d at 902. While the government must meet a higher burden than the rational relationship test applied in constitutional cases, the court still affords a significant amount of deference to the expertise of prison officials in evaluating whether they met that burden. *Gladson*, 551 F.3d at 832.

When faced with both a Free Exercise Claim and a RLUIPA claim, a court must as a threshold matter, inquire as to whether the prison has placed a "substantial burden" on the prisoner's ability to practice his religion. *Van Wyhe*, 581 F.3d at 655; *Gladson*, 551 F.3d at 833; *Patel*, 515 F.3d at 813. If the court determines that a regulation imposes a substantial burden on a prisoner, the Court will then review the burden under reasonableness and compelling interest standards. *See Gladson*, 551 F.3d at 833; *Patel*, 515 F.3d at 813. To constitute a substantial burden, the policy or regulation

> ...must significantly inhibit or constrain conduct or expression that manifest some central tenet of a person's individual religious beliefs; must meaningfully curtail a person's ability to express adherence to his or her faith; or must deny a person reasonable opportunities to engage in those activities that are fundamental to a person's religion.

Van Wyhe, 581 F.3d at 656; *Gladson*, 551 F.3d at 833; *Patel*, 515 F.3d at 813. When the

significance of a religious belief is not at issue, the same definition of "substantial burden" applies under the Free Exercise Clause and RLUIPA.[2] *Gladson*, 551 F.3d at 832; *Patel*, 515 F.3d at 813. If the prisoner fails to put forth sufficient evidence that his ability to practice his religion has been substantially burdened, then the court need not apply the *Turner* test to the Free Exercise Claim and the strict scrutiny test to the RLUIPA claim. *Gladson*, 551 F.3d at 833.

C. Analysis

As discussed earlier in this disposition, the Defendants expressed numerous safety and security concerns during the January 4, 2012, hearing regarding why the ADC grooming policy prohibits inmates from maintaining facial hair. Prison safety and security are compelling government interests. *Singson*, 553 F.3d at 662. Mr. Muhammad acknowledges that the Defendants have a legitimate penological interest in maintaining the grooming policy. However, he argues that the ADC prohibition on facial hair is not the least restrictive means available to address those interests.

Mr. Muhammad points out that ADC grants a medical exemption to inmates with certain dermatological conditions, which allows for a one-quarter-inch beard. Mr. Muhammad seeks a one-half-inch beard. And Mr. Muhammad does not assert "that the medical exemption would satisfy his religious beliefs." *See Fegans*, 537 F.3d 906.

---

[2]It has been recognized that portions of the definition of "substantial burden" requiring religious beliefs to be a "central tenet" or "fundamental" may not apply to a RLUIPA claim. *Gladson*, 551 F.3d at 832-33. In the instant case, Defendants do not challenge the sincerity of Mr. Muhammad's beliefs.

Mr. Muhammad also suggests that Defendants could follow the same procedures used by the New York Department of Correction, where a photo is taken of inmates with and without facial hair. When questioned about the harm in following the procedures used in New York, Warden Lay replied that an inmate might enter the ADC with a beard and maintain said beard until he escapes. He said, conversely, an inmate might also enter the ADC clean shaven only to grow a beard upon escape. "Although prison policies from other jurisdictions provide some evidence as to the feasibility of implementing a less restrictive means of achieving prison safety and security, it does not outweigh the deference owed to the expert judgment of prison officials who are infinitely more familiar with their own institutions than outside observers." *Fegans*, 537 F.3d at 905 (quoting *Hamilton v. Schriro*, 74 F.3d 1545, 1556 n. 15 (8th Cir. 1996)).

In considering the pleadings and testimony in this matter, the Court finds that the ADC demonstrated a compelling penological interest in prohibiting Mr. Muhammad from maintaining a one-half-inch beard, and that this prohibition was the least restrictive means available in furthering that interest. The Court further finds that Mr. Muhammad's ability to practice his religion has not been substantially burdened. During the hearing he testified that he had been provided a prayer rug and a list of distributors of Islamic material, he was allowed to correspond with a religious advisor, and was allowed to maintain the required diet and observe religious holidays.

Upon giving Mr. Muhammad full credit for his testimony, the Court finds that his claims fail as a matter of law. His Complaint (Doc. No. 2) should, therefore, be dismissed,

pursuant to 28 U.S.C. § 1915(e)(2)(B) for failure to state a claim on which relief may be granted.

V. CONCLUSION

IT IS, THEREFORE, RECOMMENDED THAT:

1. The Court's Order (Doc. No. 28) granting Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order should be VACATED.

2. Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order (Doc. No. 3) should be DENIED.

3. Plaintiff's Complaint (Doc. No. 2) should be DISMISSED with prejudice for failure to state a claim on which relief may be granted.

4. Dismissal of this action constitutes a "strike" for purposes of 28 U.S.C. § 1915(g).[3]

5. All pending motions should be DENIED as moot.

DATED this 27th day of January, 2012.

JOE J. VOLPE
UNITED STATES MAGISTRATE JUDGE

[3]The PLRA provides: "In no event shall a prisoner bring a civil action or appeal a judgment in a civil action under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted. . ."

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

(Abdul Maalik Muhammad)
Gregory Holt — PETITIONER
(Your Name)

VS.

Ray Hobbs, et al. — RESPONDENT(S)

PROOF OF SERVICE

I, Gregory Holt, do swear or declare that on this date, September 27, 2013, as required by Supreme Court Rule 29 I have served the enclosed **MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*** and **PETITION FOR A WRIT OF CERTIORARI** on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Christine Cryer, Assistant Attorney General, 323 Center St, 200 Tower Building, Little Rock, AR 72201

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 26, 2013

(Abdul Maalik)
Gregory Holt
(Signature)

OPPOSITION BRIEF

No. 13-6827

IN THE

Supreme Court of the United States

GREGORY HOUSTON HOLT
A/K/A
ABDUL MAALIK MUHAMMAD,

Petitioner,

v.

RAY HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OPPOSING A WRIT OF CERTIORARI

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January 16, 2014

Library of Congress
Law Library

QUESTION PRESENTED

Whether officials at a maximum-security prison violated the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, by prohibiting Petitioner from growing a beard, despite his religious desire to do so, where the grooming policy is necessary to protect the security and good order of the prison and where the evidence, including Petitioner's own actions, obviate that less restrictive alternatives are unworkable.

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MISCELLANEOUS

146 Cong. Rec. 16698, 16699 (2000) 2

STATEMENT OF THE CASE

Petitioner Gregory Holt, an inmate in the Arkansas Department of Correction ("ADC"), seeks this Court's review of a decision of the United States Court of Appeals for the Eighth Circuit that rejected Petitioner's Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc ("RLUIPA") challenge to the ADC's grooming policy. Mr. Holt is a Salafi Muslim who seeks to grow a beard in observance of his religion, but in contravention of the grooming policy.

The ADC's grooming policy, outlined in Administrative Directive 98-04, states, in part, as follows:

> D. No inmates will be permitted to wear facial hair other than a neatly trimmed mustache that does not extend beyond the corner of the mouth or over the lip. Medical staff may prescribe that inmates with a diagnosed dermatological problem may wear facial hair no longer than one quarter of an inch.

The purpose of the policy is "to provide for the health and hygiene of incarcerated offenders, and to maintain a standard appearance throughout the period of incarceration, minimizing opportunities for disguise and for transport of contraband and weapons." AD 98-04 (Trial Exhibit 1).

A. Statutory Background

Section 3 of RLUIPA provides that "no state or local government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the government shows that the burden furthers "a compelling governmental interest" and does so by "the least restrictive means." § 2000cc-1(a)(1)-(2). The Act defines "religious exercise" to include "any exercise of

religion, whether or not compelled by, or central to, a system of religious belief." § 2000cc-5(7)(A). To secure redress for inmates who encountered undue barriers to their religious observances, Congress carried over from RFRA the "compelling governmental interest/least restrictive means" standard. Congress noted, however, that it expected that courts adjudicating cases under Section 3 would accord "due deference to the experience and expertise of prison and jail administrators." 146 Cong. Rec. 16698, 16699 (2000).

B. The Proceedings Below

1. On June 28, 2011, Petitioner filed suit in the United States District Court for the Eastern District of Arkansas, claiming that ADC's policy and efforts to enforce the policy violated his First Amendment rights as well as those afforded to him pursuant to RLUIPA. (Docket Entry No. 2) Petitioner sought injunctive relief only. Petitioner also filed a Motion for Preliminary Injunction and Temporary Restraining Order, in which he sought a preliminary and permanent injunction ordering ADC Director Ray Hobbs and Cummins Unit Warden Gaylon Lay to cease enforcement of the grooming policy, to allow Petitioner to grow a one-half-inch beard, and to cease disciplinary efforts against inmates who grew one-half-inch beards. (Docket Entry No.3) Petitioner asked that the District Court impose an injunction without affording the Director or Unit Warden an opportunity to respond. Respondents were unaware of Petitioner's filings. On October 18, 2011, the District Court granted the motion and preliminarily enjoined ADC from forcing Petitioner to trim his beard shorter than one-half-inch in length. (Docket Entry No.

28) Respondents first learned of the case upon service of the Summons and Complaint on November 16, 2011.

2. An evidentiary hearing on the merits of Petitioner's First Amendment and RLUIPA claims was held before a Magistrate Judge six weeks later. (Docket Entry No. 73) At the hearing, Respondent Gaylon Lay, Warden of the Cummins Unit, and Grant Harris, ADC Assistant Director, testified as follows to the specific rationale for the ADC grooming policy. Lay's objections to Petitioner's request to maintain a one-half-inch beard were deeply rooted in security. (Trial Tr. 33) A person can quickly alter his appearance if he is allowed to grow a beard, such as shave his beard immediately upon escape. (*Id.*) Inmates have previously hidden contraband on their person, including homemade darts and other weapons, which would fit in an inmate's one-half-inch beard. (*Id.* at 34) Monitoring beard length would create difficulties for him and his staff on a daily basis. (*Id.*)

Lay testified about a specific incident involving the Petitioner that occurred after the issuance of the preliminary injunction. Although Petitioner's litigation position is that he would comply with a policy restricting his beard to one-half-inch in length, Petitioner threatened physical harm to a barber at the Cummins Unit when the barber tried to trim Petitioner's beard to that length. (Trial Tr. 34, 35) Petitioner accused the barber of cutting his beard too short. (*Id.* at 36) Warden Lay explained that the barbers cannot be changed merely because a particular inmate disagrees with the length of his beard. (*Id.* at 37) He also expressed his concerns

about how to determine the exact length of an inmate's beard in such a way to avoid confrontations in the future. (*Id.* at 34)

Lay further testified that contraband could be hidden inside the cheek, and any alteration to the appearance of the check would be masked by facial hair. While these issues have been problems in the past years, the population of inmates entering the ADC now is younger and more violent, which creates even greater security problems than in previous years. (Trial Tr. 40) And there are numerous difficulties in attempting to monitor the more than 15,000 inmates within the ADC; affording them with one more place to hide weapons or contraband would not be in the interest of security and safety for either employees or inmates. (*Id.* at 34)

The majority of prison facilities in other states have cell block housing units where inmates are housed in one- or two-person cells. In contrast, the Cummins Unit and several other Units within the ADC have open barracks, each housing up to 50 inmates. (Trial Tr. 53) This arrangement allows inmates greater access to one another, and greater opportunities for the use of weapons on other inmates, compared to facilities in which only one or two inmates are together in a cell. Warden Lay was also not aware of many other state facilities operating agricultural programs like the ADC does. (*Id.* at 54) At the Cummins Unit, many inmates engage in assigned agriculture work mostly outside the fence. (*Id.*) Inmates who work outside the prison fence often attempt to smuggle weapons, drugs and other contraband into the prison; therefore, allowing beards would create new opportunities for smuggling such items without detection. Lastly, Mr. Lay testified

that allowing Petitioner to maintain a beard, while not affording the same opportunity to other inmates, would elevate Petitioner's status above that of other inmates, thereby creating the real possibility of harm to Petitioner as well as others. (Trial Tr. 40) One important goal of the ADC is to treat all inmates fairly and alike.

ADC Assistant Director Grant Harris testified about a particular department-wide problem involving contraband the ADC has encountered over the last several years, namely, the introduction of cell phones into the facilities. In 2011, the ADC confiscated in excess of 1,000 cell phones from inmates. (Trial Tr. 65) The cell phone is now the primary covert means for relaying information between the inmates and the outside world including the delivery of contraband. Mr. Harris presented the Court with a cell phone SIM card that had been confiscated from a facility. The Court examined the SIM card and even measured it, which was three-eighths-inch by three-eighths-inch in diameter and easily capable of being secreted in an inmate's beard. (Respondents' Trial Exhibit No. 2) The SIM card is the piece of the phone that contains network identification and other information vital for the operation of the cell phone by the inmate seeking to facilitate the delivery of weapons and contraband. Mr. Harris testified that a SIM card can easily be hidden inside a one-half-inch beard, thus severely compromising the ADC's efforts to prevent the flow of contraband into, and within, its prison facilities.

Mr. Harris also expressed serious concern for officer safety if officers were required to perform hands-on inspections of facial hair to search for contraband and weapons. Officers would, he testified, be exposed to being cut, stabbed, and the like

from razor blades, dirty needles, or other items. (Trail Tr. 80) Mr. Harris also testified that he shared Mr. Lay's concerns about giving one inmate perceived preferential treatment over other inmates. (*Id.* at 70)

Petitioner also testified at the hearing. He testified that he had discovered a case in which Muslim inmates were allowed to maintain a one-half-inch beard. Based upon that case, Petitioner sought leave of the ADC to allow him to maintain a one-half-inch beard. (Trial Tr. 10) He did not challenge the head hair portion of the policy, only the beard section. (Trial Tr. 11) He conceded that Respondents have a compelling governmental interest in maintaining safety and security within the institution. (Trial Tr. 11) He also testified that not all Muslims believe a man must maintain a beard. (*Id.* at 13) And he acknowledged that he is able to honor his religion in a variety of other ways without wearing a beard, such as the use of a prayer rug during his worship times, reading and studying the Koran, communicating with a religious advisor, maintaining the required diet, and observing religious holidays. (Docket Entry No. 82)

Petitioner admitted that approximately three weeks prior to the January 2012 hearing, he received a haircut and beard trim from the Cummins Unit barber. (Trial Tr. 24) Petitioner conceded that he had a confrontation with the barber over the length the barber was cutting his beard. Petitioner informed the prison staff he was "at war" with the barber and threatened physical harm to the barber if they were to cross paths in the future. (*Id.* at 25) As a result of Petitioner's actions, which the ADC considered a serious, genuine threat, the ADC required that the

Petitioner and the barber no longer be allowed to have any contact with one another.

Petitioner confronted Warden Lay and Assistant Director Harris with alternative policies he believed would allow him to maintain a one-half-inch beard, while addressing ADC's security and other concerns. Both Lay and Harris explained why Petitioner's proffered options were unworkable and provided support for their opinions. Petitioner did not offer any testimony other than his own, nor did he offer any documentary evidence at the hearing.

In addition to receiving the testimony offered by Petitioner, Warden Lay, and Assistant Director Harris, as well as the documentary evidence offered by ADC, the Magistrate Judge took judicial notice of the evidence that had been submitted in a previous ADC RLUIPA case. *Fegans v. Norris*, 537 F.3d 897 (8th Cir. 2008). During the bench trial in *Fegans*, ADC Director Larry Norris testified that the ADC prohibition on inmate facial hair prevented inmates from changing their appearance, and made it easier for law enforcement to track and identify an inmate following an escape. (Docket Entry No. 82) He also said that "an uncut beard would make identification more difficult and would facilitate the smuggling of contraband. An uncut beard creates a better disguise for an escapee than a quarter-inch beard, because it conceals the contours of an inmate's face." *Fegans*, 537 F.3d at 907.

3. Following the hearing, the Magistrate Judge issued Proposed Findings and Recommendations that Petitioner's claims should be dismissed and that the court's previous order granting a preliminary injunction should be vacated. (Docket

Entry 82) The District Court approved and adopted the Proposed Findings and Recommended Disposition in their entirety. A few days later, however, the court granted Petitioner's motion to stay the lifting of the preliminary injunction.

Petitioner appealed the dismissal of his RLUIPA claim, but not the dismissal of his First Amendment claim, to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit affirmed in a short, unpublished opinion. Applying strict scrutiny, the Eighth Circuit concluded that Respondents had met their burden under RLUIPA of establishing that the ADC's grooming policy was the least restrictive means of furthering a compelling penological interest, notwithstanding Petitioner's citation to cases indicating that prisons in other jurisdictions have sometimes been able to meet their security needs while allowing inmates to maintain facial hair. *Holt v. Hobbs*, 509 Fed.Appx. 561, 2013 WL 2500568 (8th Cir. 2013).

Following the Eighth Circuit's decision, the Respondents moved the District Court to vacate the preliminary injunction. The District Court did so on September 16, 2013. Petitioner then petitioned for a writ of certiorari and, two weeks later, moved for a Stay of Enforcement Pending his Petition for Certiorari. On November 14, 2013, this Court granted Petitioner's application for an injunction. Respondents are currently enjoined from enforcing the ADC's grooming policy to the extent that it prohibits the Petitioner from growing a one-half-inch beard.

REASONS FOR DENYING THE PETITION

The Eighth Circuit's unpublished decision denying Petitioner's RLUIPA claim does not warrant this Court's review. Petitioner erroneously argues that there is a split among the circuits regarding how RLUIPA applies to prison policies that prohibit facial hair. Closer examination of those cases reveals that, rather than a true split on any matter of law, each case applied the same legal analysis under RLUIPA to varied and nuanced factual records. The differing outcomes reflect differences in the proof presented to the courts and not disagreements about the applicable law.

Nor does Petitioner's First Amendment claim warrant review. That claim is not properly before this Court because he did not appeal the District Court's dismissal of it. He may not now advance an argument already abandoned on appeal.

In any event, this case is a poor vehicle for any further analysis of RLUIPA. The District Court took judicial notice of the evidence considered when the ADC's grooming policy was created in 1998, and it considered the new testimony of prison officials who, based on their expertise and experience, convincingly refuted the notion that any proffered alternatives were feasible. The evidentiary record is devoid of evidence suggesting that ADC's concerns are overstated or that a proffered alternative is feasible. Other than Petitioner's own testimony about what the policy should be, the record contains no evidence at all rebutting the evidence submitted by the ADC. The Court should not take a case in which the trial court's evidentiary

record is so one-sided. Accordingly, the petition for a writ of certiorari should be denied.

I. THE LOWER COURTS UNIFORMLY APPLY RLUIPA STANDARDS TO DIFFERING FACT PATTERNS AS THEY ARISE.

In arguing that the Eighth Circuit's decision warrants review, Petitioner contends that there is a split among the circuits regarding the application of RLUIPA to prison policies that restrict inmate facial hair. There is not. Closer examination of the relevant cases reveals that, rather than a true split as to substantive law, each court applied the same legal standard in addressing factual records that varied from case to case. The differences in outcomes reflect differences in the proof presented in each case.

Specifically, Petitioner points to decisions by three federal courts of appeals – the Fourth, Fifth, and Ninth Circuits – holding that prison bans on beards violate RLUIPA. But the Fourth and Fifth Circuits have also issued decisions *upholding* prison bans on beards against RLUIPA challenges. None of those decisions prompted *en banc* review, presumably because the courts of appeal recognized that the differences in results stemmed from differences in the facts rather than any differences in legal standards. Importantly, the Ninth Circuit decisions were expressly based on the state's failure to offer proof on the "least restrictive means" issue.

The Ninth Circuit. In 1995, Muslim prisoners asked the court (1) to prevent the California DOC from disciplining inmates when they missed work on

Fridays in order to attend Jumu'ah Prayer and (2) to allow inmates to maintain one-half-inch beards for religious purposes. *Mayweathers v. Newland*, 258 F.3d 930 (9th Cir. 2001). A total of 15 preliminary injunctions in favor of particular inmates were issued during the pendency of the litigation, allowing them to attend Jumu'ah Prayer to maintain one-half-inch beards. The district court eventually granted a permanent injunction in favor of the inmates when the state failed to adequately justify that its policy restricting beard length was necessary for security concerns. The Ninth Circuit affirmed the district court's decision. The Ninth Circuit's decision reflected the failure of the state to present evidence in support of its beard policy, not a misinterpretation of applicable law. *Mayweathers v. Terhune*, 32 F.Supp.2d 1086 (E.D.CA. 2004).

The same is true of *Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005), decided the following year. There, a Native American inmate presented a RLUIPA challenge to a specific portion of a grooming policy pertaining to hair length. In reversing the district court, the Ninth Circuit held that the prison had failed to meet the second prong of its burden under RLUIPA. The California prison argued that safety and security of both inmates and prison staff were compelling interests, but it presented only conclusory statements rather than persuasive evidence that the hair grooming policy was the least restrictive means of ensuring prison security. *Id.*, 418 F.3d at 999.

The Fifth Circuit. The Fifth Circuit has twice ruled that prison restrictions on beard length *do not* violate RLUIPA. *See, DeMoss v. Crain*, 636

F.3d 145 (5th Cir. 2011) (per curiam); *Gooden v. Crain*, 353 Fed. Appx. 885 (5th Cir. 2009) (per curiam). The court has once ruled otherwise. *See Garner v. Kennedy*, 713 F.3d 237, 248 (5th Cir. 2013). The Fifth Circuit explained that its previous rulings were based upon "a substantially different record" than the record in *Garner*, mandating the different outcomes. *Id.*

The Fourth Circuit. The Fourth Circuit in *McRae v. Johnson*, 261 Fed. App'x. 554 (4th Cir. 2008), affirmed the dismissal of RLUIPA claims brought by a group of inmates challenging the Virginia Department of Corrections' ("VDOC") grooming policy. The district court explicitly relied upon the evidence presented by the VDOC demonstrating the security risks posed by allowing inmates to wear long hair or facial hair. *Id.*at 560. VDOC Director Gene Johnson, a prison administrator with more than 40 years of prison experience, testified that Virginia's prohibition on facial hair was the least restrictive means of suppressing contraband, maintaining the health and safety of inmates and staff, and preventing prisoners from quickly changing their appearance. *Id.* at 558. Specifically, Johnson testified that prior to the implementation of the VDOC grooming policy, he had witnessed a correctional officer injured by a razor blade hidden in an inmate's hair; had seen inmates conceal contraband such as wires, rope, rocks, and tobacco in their hair; had known of beards that caused delays in medical treatment by concealing serious conditions such as tumors and lesions; and had witnessed facial hair infested with lice and spiders. *Id.* Despite the plaintiff's attempts to counter this evidence with testimony

from a prison management consultant, the district court, and ultimately the Fourth Circuit, held that the State had met its burden under RLUIPA. *Id.*

One year later, the Fourth Circuit examined a very different record on appeal and determined that a South Carolina Department of Corrections grooming policy, which required the forcible shaving of the heads of noncompliant inmates, violated RLUIPA. *Smith v. Ozmint*, 578 F.3d 246 (4th Cir. 2009). In *Smith*, the court found that the state failed to present sufficient evidence to establish that compelling inmates to shave their heads constituted the least restrictive alternative.

In a 2012 case, the Fourth Circuit determined that a VDOC policy prohibiting inmates from wearing a one-eighth-inch beard for religious reasons violated RLUIPA. *Couch v. Jabe*, 679 F.3d 197, 199 (4th Cir. 2012). The court based its decision on the state's failure to present sufficient evidence in support of its case – not upon a differing view as to the correct legal standard. *Id.* at 204. In each of the Fourth Circuit cases, the same legal standard was applied, but different evidentiary records resulted in different outcomes.

Other Courts. In his Supplemental Brief, Petitioner cited seven additional cases.[1] Of those seven, only one, *Muhammad v. Sapp*,[2] an

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[1] *Couch v. Jabe*, 679 F.3d 197 (4th Cir. 2012); *Garner v. Kennedy*, 713 F.3rd 237, 85 Fed.R.Serv.3d 248 (5th Cir. 2013); *Jova v. Smith*, 582 F.3d 410, 416 (2d Cir. 2009); *Knight v. Thompson*, 723 F.3d 1275 (11th Cir. 2013); *Lovelace v. Lee*, 472 F.3d 174 (4th Cir. 2006); *Muhammad v. Sapp*, 494 Fed.Appx. 953, 2012 WL 5359235 (11th Cir. 2012); and *Washington v. Klem*, 497 F.3d 272, 283 (3rd Cir. 2007).

unpublished case from the Eleventh Circuit, addressed beard grooming policies under RLUIPA. The Eleventh Circuit's holding in that case was consistent with the Eighth Circuit's decision here. In *Muhammad*, an inmate in the Florida Department of Correction challenged a policy that required inmates to shave or be forcibly shaved. The district court held that the prison's policy did not violate RLUIPA, even though the prisoner contended that his religious beliefs provided that he should not cut his beard. The district court found that the prison's grooming policies furthered a compelling government interest and were the least restrictive means of furthering that compelling interest. The Eleventh Circuit affirmed the district court's decision.

Petitioner also cited (Supp. Br. 1-4) the Eleventh Circuit's denial of *en banc* rehearing in *Knight v. Thompson*, 723 F.3d 1275 (11th Cir. 2013). As an initial matter, the facts here are not similar to those in *Knight*. In *Knight*, a group of Native American inmates in Alabama's DOC sought to maintain unlimited hair length for religious reasons. Beards were not at issue in *Knight*. Moreover, the Eleventh Circuit's decision in *Knight* is entirely consistent with the Eighth Circuit's decision here. Both sides in *Knight* relied upon expert testimony and numerous evidentiary exhibits admitted at trial. The Eleventh Circuit found in favor of the prison, citing to *Cutter v. Wilkinson, supra*. The court concluded that although RLUIPA protects, to a substantial degree, the religious observances of

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[2] 494 Fed.Appx. 953, 2012 WL 5359235 (11th Cir. 2012)

institutionalized persons, it does not give courts *carte blanche* to second guess the reasoned judgments of prison officials. *Knight*, 723 F.3d at 1283.

Finally, in addition to the cases cited by Petitioner, the court in *Kuperman v. Wrenn*, 645 F.3d 69, 80 (1st Cir. 2011), noted that its dismissal of a Jewish inmate's RLUIPA beard-length claim rested upon the failure of the inmate to submit "admissible evidence to counterbalance Prison Officials' affidavits." *Kuperman*, 645 F.3d at 80.

The circuit courts have not held that facial hair restrictions are always permissible; nor have they held that such restrictions are always impermissible. Rather, they have based their rulings on the facts presented, examined each grooming policy in the context of the factual record, and considered each state's particular circumstances under RLUIPA's strict-scrutiny standard. That is precisely what Congress anticipated courts entertaining RLUIPA challenges would do, "accord[ing] 'due deference to the experience and expertise of prison and jail administrators.'" *Cutter v. Wilkinson*, 544 U.S. 709 (2007).

II. RESPONDENTS PROPERLY APPLIED THE STRICT SCRUTINY STANDARD AND REBUTTED THE FOUR ALTERNATIVES TO THE ADC GROOMING POLICY ASSERTED BY PETITIONER AT THE EVIDENTIARY HEARING.

Petitioner argues that the circuits are divided over "whether a prison system must actually consider less restrictive measures before rejecting them" and "whether a prison system must demonstrate that it cannot grant religious accommodations that other systems have successfully granted." (Pet. Supp. Br. at

2-3). Petitioner is wrong. There is no split among the circuits as to the legal standard applicable to RLUIPA grooming cases.

A. Lower Courts Agree That Congress Mandated a Strict-Scrutiny Standard When it Enacted RLUIPA.

Section 3 of RLUIPA requires courts to apply strict scrutiny to government actions that substantially burden the religious exercise of institutionalized persons. *Benning v. Georgia*, 391 F.3d 1299, 1304 (11th Cir. 2004); *Freeman v. Texas Dep't of Criminal Justice*, 369 F.3d 854, 857–58 n.1 (5th Cir. 2004); *Lovelace v. Lee*, 472 F.3d 174, 186 (4th Cir. 2006); *Murphy v. Missouri Dep't of Corr.*, 372 F.3d 979, 987 (8th Cir. 2004). Thus, prison officials must prove that any substantial burden upon an inmate's religious exercise is necessary because it is the least restrictive means of accomplishing a compelling state interest.

Petitioner argues that, because various courts have placed differing degrees of weight on certain types of evidence, there must be a circuit split regarding the underlying legal standard. But the strict-scrutiny standard is one of this Court's most clearly-defined legal tests. It is applied every day by lower courts in cases raising various types of claims, such as cases involving race-based decisions and claims involving the alleged deprivation of fundamental rights. Lower courts have demonstrated an ability to apply the strict-scrutiny standard without bright-line rules that establish what evidence must be deemed dispositive or entitled to the most weight. Petitioner further argues that the Eighth Circuit failed to properly apply the strict-scrutiny standard because it showed deference to Respondents'

experience and expertise in the unique area of prison security. (Pet. Supp. Br. at 4.) Contrary to Petitioner's argument, deference to prison officials is not incompatible with strict scrutiny. In fact, this Court specifically said in *Cutter v. Wilkinson* that, in enacting RLUIPA, Congress "anticipated that courts would apply the Act's standard with due deference to prison administrators' experience and expertise." *Id.*, 544 U.S. 709 (2005). Therefore, rather than abdicating its judicial role or demonstrating any deviation from the appropriate legal standards, the Eighth Circuit's deference to Respondents' expert judgment regarding prison security was a direct application of this Court's holding in *Cutter*.

B. There Is No Record Evidence That Feasible, Less Restrictive Alternatives to ADC's Grooming Policy Exist.

At the evidentiary hearing, Petitioner questioned Warden Lay and Assistant Director Harris about four proposed alternatives to the ADC grooming policy: (a) indefinite housing in administrative segregation; (b) visual inspection of beard lengths; (c) alternating photographs of inmates; and (d) hands-on inspection by staff. At the hearing, ADC presented testimony persuasively explaining why these proffered alternatives were unworkable. Although Petitioner argued there were at least four options, he presented no evidence at all rebutting ADC's evidence that the options were not feasible.

Petitioner first suggested that perhaps he, and presumably any other inmate who desired to grow a one-half-inch beard, could be housed in administrative segregation, for as long as he wished. (Trial Tr. 27) Respondents rejected this option based upon Eighth Circuit case law, in which the Court held that indefinite

administrative segregation may violate due process. *Williams v. Hobbs*, 662 F.3d 994 (8th Cir. 2011).

In response to Respondents' safety concerns regarding the proper identification of inmates and how growing beards would alter their appearance, Petitioner proposed that inmates be photographed clean shaven as they enter the ADC and then photographed again once they had grown a one-half-inch beard. (Trial Tr. 56) ADC officials testified that between 15,000 – 17,000 inmates are in the custody of the ADC. Photographing inmates and then having to ascertain which appearance the inmates were exhibiting each day would be an arduous and overly-burdensome task for the already overtasked staff.

Next, Petitioner inquired about the possibility of visually monitoring inmate beard lengths in order to determine when one was out of compliance. (Trial Tr. 59) In response, testimony was given as to how different people have differing hair types which will grow at different thicknesses and rates. Determining precisely how long a beard is would be difficult, especially if the inmate and correctional staff member disagreed as to the precise length. Petitioner had himself violently disagreed with his barber over the actual length of his beard. Respondents testified they did not see a workable method for gauging the lengths without touching the inmates and using a measuring tape to precisely measure the length of potentially thousands of beards on a daily basis. (Trial Tr. 59)

Lastly, Petitioner recommended that staff members not only visually inspect each inmate beard on a daily basis, but that they physically inspect the one-half-inch beard on a daily basis. (Trial Tr. 59) As a practical matter, officers do not

generally lay hands on inmates' above the shoulders. If they were to need to physically inspect and search every beard, serious security concern for officer safety would arise. Specifically, an officer physically running his or her hand through an inmate beard could result in that officer cutting or pricking his or herself with dirty needles or broken razorblades. (Trial Tr. 80). As such, hands-on inspections of inmate beards would create a further detriment to the safety and security of the facility.

In his writ petition, Petitioner offers several new alternatives for consideration, including running a metal detector over the facial area in a "wave," providing special religious barbers, and disciplining inmates who grow beards longer than one-half-inch. (Pet. Br. at 10). These alternatives are flawed for several reasons. First, none of these options was raised in Petitioner's pleadings nor discussed before the District or Circuit Courts. And, no evidence was presented in support of, or opposition to, such alternatives, and thus, the record is devoid of evidence. There is no evidence in the record whether providing a special religious barber for some inmates but not others could work. Similarly, because the use of hand-held metal detectors was never mentioned, no evidence was offered on such devices, including their availability, feasibility, reliability, or cost.

Petitioner's new third alternative is that inmates whose beards grow longer than one-half-inch should be disciplined. But, as already noted, Petitioner refused to have his beard trimmed and sought judicial intervention to prevent ADC from disciplining him. As the confrontation between Petitioner and the barber demonstrates, the idea that every inmate's beard should be frequently measured

and trimmed, and that every non-compliant inmate should be immediately disciplined would raise intractable problems as to manpower and the safety and security of inmates and employees alike. Petitioner has offered no explanation to address potentially violent interactions between bearded prisoners and the barbers needed to ensure compliance with a one-half-inch policy.

It is unclear from Petitioner's Supplemental Brief when he believes a prison system must actually consider less restrictive alternatives. But, in the present case, the record evidence showed that such alternatives were considered and rejected as infeasible both at the time the policy was originally adopted and then again in response to Petitioner's suit.

The Magistrate Judge took judicial notice of the evidence of alternatives considered prior to the issuance of the grooming policy. *Fegans v. Norris*, 537 F.3d 897 (8th Cir. 2008) In 2003, inmate Michael Fegans sued ADC Director Larry Norris and other ADC personnel, claiming the ADC's failure to provide a religious exemption to the grooming policy violated his constitutional rights and RLUIPA. During the bench trial held in *Fegans*, evidence was presented detailing the history of Administrative Directive 98-04 ("AD 98-04"), the grooming policy enacted in 1998 by Norris. The evidence presented was that, in 1997, Director Norris' staff conducted research pertaining to the hair and grooming policies of five other states and the Federal Bureau of Prisons. The information gathered, along with the experiences Norris and his staff had encountered over the years with contraband and other security concerns, played a role in formulating the ADC grooming policy. *Fegans*, 537 F.3d at 905.

Prior to the enactment of AD 98-04, prison officials considered other alternatives to creating a hair limit and no beard policy, and in fact tried one such option. Under the former ADC grooming policy, which permitted long hair, prison officials found that the use of hair to conceal contraband or to change appearance after an escape had in fact occurred. *Id.*

Petitioner also raises the question in his Supplemental Brief "whether a prison system must demonstrate that it cannot grant religious accommodations that other systems have successfully granted." (Pet. Supp. Br. at 1). Respondents assert that this question is not proper for consideration. At the evidentiary hearing, Petitioner did not introduce any evidence regarding policies or practices of any other department of correction. He called no witnesses who could testify as to the specific policies being applied in other states. Rather, Petitioner inquired of the Warden and Assistant Director about their knowledge of other state policies, to which they responded they did not have any specific knowledge.

Again, judicial notice was taken of the *Fegans* case and the evidence presented at trial. In 1998, Director Norris issued a new grooming policy for all Arkansas prisons. Fegans argued that the ADC's grooming policy was not the least restrictive means available because other prison systems employ more liberal grooming policies. Those alternatives were considered and rejected as less effective in meeting the ADC's security and safety concerns.

The circuit courts have consistently based their rulings on the facts presented in each case, considering each state's particular circumstances. There is simply no

split among the circuits on any matter of applicable law that would warrant a grant of certiorari.

III. PETITIONER'S FIRST AMENDMENT CLAIM IS NOT PROPERLY BEFORE THIS COURT

Petitioner appealed only the dismissal of his RLUIPA claim to the Eighth Circuit; he abandoned his First Amendment claim, provided he even raised in the first place. In his Reply Brief at the Eighth Circuit, Petitioner argued that he had never intended to assert a First Amendment claim. The Eighth Circuit did not consider his First Amendment Claim and affirmed the District Court's dismissal of the RLUIPA claim. Petitioner's First Amendment claim is therefore not properly before this Court. *Cardinale v. Louisiana*, 394 U.S. 437 (1969). The Court "ordinarily will not decide questions not raised or litigated in the lower courts." *City of Springfield, Mass. v. Kibble*, 481 U.S. 257 (1987). Because Petitioner failed to appeal the dismissal of his First Amendment claim, he has either knowingly waived or forfeited that claim. *See Puckett v. U.S.*, 556 U.S. 129 (2009).

IV. THIS CASE IS A POOR VEHICLE FOR REVIEWING THE LEGAL STANDARDS UNDER WHICH PRISON GROOMING POLICIES MUST BE EVALUATED UNDER RLUIPA

Even if the Court were otherwise inclined to consider prison beard policies under RLUIPA, this case is a poor vehicle for doing so. The Eighth Circuit did not publish its decision in this case. As a consequence, the Eighth Circuit's decision has no precedential value within the circuit. Even if there were a genuine circuit split – and there is not – the decision below would not deepen it.

Respondents introduced evidence, including specific examples of evolving security concerns involving contraband and how allowing inmates to maintain a one-half-inch beard would greatly intensify those problems. Petitioner did not provide evidence to contradict the ADC's thorough justification of its grooming policy. The District Court analyzed the RLUIPA standard as to the specific facts of Petitioner's case. The Eighth Circuit reviewed the District Court's analysis of the evidence and affirmed.

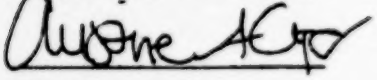
The evidence offered to the Court regarding cell phones, agricultural field work performed outside the prison fence, and documented behavior of the Petitioner, makes this a poor vehicle for re-evaluating RLUIPA. Grant Harris testified about security problems the Department has had involving cell phones and SIM cards, and how allowing inmates to grow beards would very likely increase those problems.

Moreover, Respondents presented evidence that a less restrictive means of maintaining security while allowing Petitioner to maintain a one-half-inch beard pursuant to the preliminary injunction was not possible. The dangerous situation created by Petitioner (as a potential population sample of one) when he threatened the barber, clearly illustrates the validity of Respondents' concerns.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

By: 

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CERTIFICATE OF SERVICE

I, Christine A. Cryer, Assistant Attorney General, do hereby certify that on this 16th day of January, 2014, I mailed the foregoing document by U.S. Postal Service to the following counsel of record:

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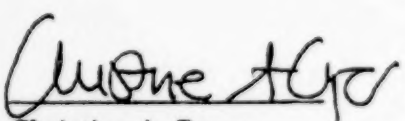
By: 

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No. 13-6827

IN THE

Supreme Court of the United States

GREGORY HOUSTON HOLT
A/K/A
ABDUL MAALIK MUHAMMAD,

Petitioner,

v.

RAY HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

APPENDIX

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January 16, 2014

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

GREGORY HOLT,
A.K.A. ABDUL MAALIK MUHAMMAD,
PLAINTIFF,
VS.
RAY HOBBS, ET AL,
DEFENDANTS.

Docket No. 5:11-CV-00164-BSM

Little Rock, Arkansas
January 4, 2012
9:57 A.M.

TRANSCRIPT OF

HEARING ON MOTION FOR TEMPORARY INJUNCTION

BEFORE THE HONORABLE JOE J. VOLPE

UNITED STATES MAGISTRATE JUDGE

ELECTRONIC COURT RECORDER-OPERATOR: Ms. Stacy Williams

Transcription Service:

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PROCEEDINGS RECORDED BY ELECTRONIC SOUND RECORDING.

TRANSCRIPT PRODUCED BY TRANSCRIPTION SERVICE.

APPEARANCES:

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I N D E X

	DIRECT	CROSS	REDIRECT	RECROSS	PRESIDING OFFICIAL
WITNESS FOR PLAINTIFF:					
Gregory Holt, a.k.a. Abdul Maalik Muhammad	7	14			
WITNESSES FOR DEFENSE:					
Gaylon Lay	32	45	63	63	61
Grant Harris	64	72	76,80	80	77

EXHIBITS:	IDENTIFIED	RECEIVED
Defense Exhibit No. 1	71	71

PROCEEDINGS

(Call to order of the Court.)

THE COURT: Good morning. We are here in the matter of *Gregory Holt also known as Abdul Malik Muhammad v. Ray Hobbs*, director of Arkansas Department of Correction, and others. This is case 5:11-CV-164. And we are here for a hearing on the motion for a temporary injunction filed by -- do you go by Mr. Muhammad?

THE PLAINTIFF: Yes, sir

THE COURT: All right. Filed by Mr. Muhammad in this case. Initially, I had looked at the motion and looked also at the Eighth Circuit precedent in *Fegans v. Norris*, and I thought that it should be denied. Judge Miller looked at it and sent it back to me. And having a second look at it, I think Judge Miller is right, that it requires an individual and particular analysis on the motion. So I was incorrect, and denied it based on not hearing any other facts than what was pled and comparing it to the case in *Fegans*. So I set it for a hearing, and here we are. And welcome. Thanks to our Arkansas Department of Correction transportation folks always getting everybody here on time, on target, we appreciate it so much.

And I guess it's your motion, Mr Holt.

Ms. Cryer, will you tell me who is at the table with you? I see Mr. Hobbs, is that --

MS. CRYER: Actually, Your Honor, Mr. Hobbs is not here. I have Warden Gaylon Lay from the Cummins Unit.

THE COURT: Okay. Warden.

MS. CRYER: I have Assistant Director Grant Harris with the Department of Correction. Mr Hobbs is not here today.

THE COURT: And I'm sorry, I thought -- I had recognized Mr. Lay -- or Warden Lay from another hearing a while ago, it's been a while since I've seen you all. But, welcome, thank you.

Do you have any witnesses, Ms. Cryer?

MS. CRYER: Your Honor, I do have a number of other individuals who are here. I do not know whether they will be called to testify or not. But I can go ahead and identify them for the record if you would like for me to do so.

THE COURT: Sure. Why don't you do that, please.

MS. CRYER: Okay. We have Deputy Warden Andrea Weekly from the Cummins Unit. I'm sorry, I'm trying to sit down so you can see.

THE COURT: Sure. That will be fine. Thank you.

MS. CRYER: We have Chaplain Wilson Bates from the Cummins Unit.

THE COURT: Chaplain.

MS. CRYER: We have Chaplain John Wheeler, who is the head chaplain, am I --

MR. WHEELER: Administrative.

MS. CRYER: Okay Administrative for the Department of Correction. And we also have Chaplain Amin, who is the Islamic coordinator for the Department of Correction.

THE COURT: All right. Very good.

And, Mr Muhammad, did you have any witnesses at this time or that you plan to present?

THE PLAINTIFF: No, sir.

THE COURT: All right. Well, very good. I mean, Mr Muhammad, I've read your pleadings and your motion and, at this point in time, it's your obligation to kind of move forward, if you will, and tell me a little bit about your claim. Give me some facts on your request with the Department of Correction with regard to your exemption and just kind of lay some foundation. Ultimately, it's going to be, I believe, up to the defense to provide a reasonable basis for denying the exemption. But I want you to go ahead and lay out your facts for the record, if you would.

THE PLAINTIFF: Do you want me to come to the lectern or just --

THE COURT: It's whatever is your pleasure. You have a bunch of documents there. Do you need to refer to your documents?

THE PLAINTIFF: I have the ones -- the main ones that I intend to refer to, I've already pulled them out of the file

along with some stuff from the Koran that details to help you get a better understanding of where I'm coming from on this particular motion here.

THE COURT: Well, why don't you come forward then, sir. If you want, why don't you come -- you can have a seat here.

THE PLAINTIFF: Okay.

THE COURT: Since you're going to be a testifying witness, and I'll put you under oath as well.

GREGORY HOLT, A.K.A. ABDUL MAALIK MUHAMMAD, PLAINTIFF HEREIN, SWORN.

DIRECT EXAMINATION

BY THE COURT:

Q All right. Mr. Muhammad, tell me how old are you, sir?

A 36.

Q And where did you grow up?

A Little Rock.

Q And how long have you been incarcerated?

A This time, I've been locked up two years.

Q Two years. What kind of sentence are you serving?

A Life, plus 40.

Q And what was the conviction?

A Aggravated residential burglary and domestic battery, first degree.

Q Out of Pulaski County?

A Yes, sir.

Q All right. And what unit are you presently in?

A Cummins Unit.

Q And tell me what led to the filing of your complaint and then your motion?

A As a -- I'm what's called a Saliba's Muslim. Okay. I believe in following the Sabbath of the Prophet Muhammad, which is the way of the Prophet Sunnah, things of that nature. And one of the areas of the Sunnah that's addressed by the Prophet Muhammad, sallallahu alayhi wa sallam, or peace be upon him, is that one of the characteristics of a Muslim or Al-Fitra is to keep the mustaches short and leave the beard as it is. As I pointed out in my memorandum of law, I believe it's in this -- in the complaint itself, I referred to a Hadith known as Sahih Al-Bukhari. Sahih Al-Bukhari is one of the leading collections of Hadith in the Muslim world. It's recognized as a sound Hadith, which is the sayings or the works or the practices the Prophet Muhammad, how he -- how he did things, and it was narrated by companions who were with him or who were considered legitimate sources of information as it relates to the way the Prophet Muhammad did things. And then Sahih Al-Bukhari, Hadith 7 -- or Volume 7. Hadith No. 5893, the Prophet Muhammad there laid out that there are several characteristics of Al-Fitra. Some of those characteristics are you shave the underarm hair, you shave the

pubic hair, you clip the nails, but you also clip mustaches short, leave the beard as it is.

When I came to the department of -- Arkansas Department of Correction, I wasn't aware of what their grooming policy was until I came to Diagnostic. When I got to Diagnostic, I found that you could only have a mustache that does not extend past the corners of the mouth. At that point, I informed that -- the correctional staff there that as a -- as a devout Muslim, that it was my belief that you should grow your beard out. I was informed that if I didn't comply, I would be given -- and shave, I would be given disciplinaries. I did receive several disciplinaries. And after I saw how the Department of Correction practices their penalties, which is called progressive penalties, which they can come and give one -- one officer can give you an order to shave, and then if you refuse, he'll get you -- write you a disciplinary, another officer can come right behind him, give you an order to shave, and if you refuse to shave, he can write you a disciplinary, and it can go on and on to the point that you're in the hole -- in the hole a year, two years, three years. So, at that point, I saw really there was no way out but to go ahead, as much as I hated to, and to shave and violate my beliefs.

I was doing some legal research this past year, in 2011, on some cases from other circuits where the grooming policy had been challenged, and I came across one out of the Ninth

Circuit, the *Mayweathers* case, in which the Muslims in the Department of Correction in California sued over the very same thing that the ADC practices. In fact, the California Department of Correction practices some of the exact same things that the Arkansas Department Correction does. In that particular case, the brothers there argued for a half inch beard. So what I did was, I went ahead and filed through the Administrative Remedy process at Cummins Unit, I filed a grievance asking for that the grooming policy be set aside and that I be given a religious exception exemption to the grooming policy.

Warden Lay -- Warden Lay refused. His response was that it was the Department of Correction's policy that the reason that they don't allow you to grow any facial hair other than a mustache is because you could hide contraband or weapons in the facial hair And my argument to that is that with a half inch beard, you can't hide anything at all in the facial hair You can hide it more easily in the head hair. As you can you see here, I could easily hide a weapon of some kind in the head hair, but the Department of Correction doesn't require you to shave your head. Their policy on the head hair is that you can only grow the sideburns, they can't go past the middle of the earlobe, and it can't go past the middle of the nape of the neck. Other than that, they don't have a policy as to how thick it can be on the top. In fact, it is a common practice

at the Cummins Unit to transport weapons and contraband in the head hair I know this for a fact.

So after the policy -- after my grievance was denied all the way up to Mr. Larry May, I filed this action basing it on the *Mayweathers* case out of California.

The issue is, is whether or not a half inch beard would be able to be -- you'd be able to hide anything in it. I am not pushing for an unrestricted beard growth. I am not challenging the hair -- the head hair policy. All I'm asking is that I be allowed to grow a half inch beard based on my religious beliefs, because it would -- it would contribute to the safety and good order of the institution, it would not be a threat to the institution because I've been walking in the hallways up until recently with a half inch beard on my face and there hasn't been any problems. I don't foresee any -- I don't see how there could be any problems now with allowing me to continue to grow it at this rate, which is getting close to a half inch, and allow me to do that based on my religious beliefs.

Q What is the policy now, is it a quarter inch?

A They -- the policy still is that they can only grow a mustache that cannot extend past the corners of the mouth. They allow for dermatological reasons, if you have a skin condition, they allow you to grow up to a quarter inch beard and then use the clippers to shave it after it gets -- it gets

to a quarter inch length.

Now, my argument on that is, is that if -- if a quarter inch beard does not pose a security threat, I don't understand how a half inch beard could.

One is for dermatological reasons. One is for religious reasons. But I don't understand how it could be a security threat, because you cannot hide anything in this, you can see everything on the face.

Q You have a beard. What's the current -- how are you able to have a beard right now?

A I was allowed to based on the restraining order that -- or the injunction that Judge Miller entered.

Q Okay.

A I made an agreement with Warner -- Warden Warner and Major Robertson because they asked me how long are you going to let it grow, I said because I had asked for a half inch, I was going to keep at a half inch, and that's what I have strived to do at this point.

Q All right. All right. Do you have anything further? I mean, that pretty well lays out what I need to know. Do you have anything further to add?

A Well, there is one thing, because I know in the Muslim world, it is not -- not every Muslim believes that it is a requirement that you grow the beard, and some Muslims believe that the Hadiths as it relates to the Prophet are only

advisory or something that you can choose to do if you want to. But I turn your attention in the Koran to Surah 4, Ayah 80, and in that particular Ayah, it says [indiscernible], he who obeys the messenger Muhammad, sallallahu alayhi wa sallam, has indeed obeyed Allah, but he who turns away, then we have not sent you Muhammad, sallallahu alayhi wa sallam, as a watcher over them. Which in that statement there, in that particular Ayah, it refers to the fact that something that the Prophet Muhammad did, that Muslims should do, and if the Prophet Muhammad said to do it, if you don't do it, you're disobeying Muhammad and therefore you're disobeying Allah [indiscernible] Allah.

THE COURT: And I don't think there is any burden on you to prove under RLUIPA that -- I mean, I don't think you have any burden of proving your religious needs, I don't think. Am I correct on that, Ms. Cryer? I think RLUIPA is pretty wide open, is it not?

MS. CRYER: It is, Your Honor, and because there is no mechanism for us to really challenge whether or not his belief is sincerely held, we're not standing here today challenging whether or not he believes, you know, in the various prophets or whether or not he follows the Koran.

THE COURT: Okay. And like I said, I don't think the law impedes that on him either. So that's fine, Mr. Muhammad, your point is well taken, but there's no burden on you to

prove that.

All right. Now I bet Ms. Cryer has some questions of you and I'll allow her to cross examine you unless you have anything further that you wanted to add.

THE PLAINTIFF: I don't at this point.

THE COURT: Okay. Thank you, sir

MS. CRYER: Thank you, Your Honor.

CROSS EXAMINATION

BY MS. CRYER:

Q Mr. Holt, I may jump around a little bit, and I apologize if I do. And I also apologize for calling you Mr. Holt if I'm to call you Mr Muhammad. Okay. Let me ask -- and again, I may skip around a little bit, the *Mayweathers* case that you are referring to is out of the Ninth Circuit case and was that a 2004 case?

A Yes, ma'am.

Q Okay. Now you entered the Department of Correction in July of 2010; is that correct?

A Yes, ma'am.

Q All right. Had you ever been incarcerated in the department of -- Arkansas Department of Correction before that date?

A Not physically incarcerated. I had state time that was run concurrent with fed time.

Q All right. But this was your -- July 2010 was your first

time actually entering the facilities of the Arkansas Department of Correction?

A Yes, ma'am.

Q All right. Now, let me ask, with regard to practicing your religious beliefs, there are other ways that you are entitled and allowed to practice your religion, correct?

A At Cummins Unit?

Q Yes.

A It's very limited.

Q Okay You can pray, correct?

A I can pray.

Q Okay. You have a Koran, correct?

A Yes, ma'am.

Q Okay. And, in fact, you've had the Koran since you left the Diagnostic Unit and were transferred to the Cummins Unit in July of 2010, correct?

A Yes, ma'am.

Q Okay. You are allowed to request books or religious materials from various distributors, correct?

A No, ma'am.

Q Okay. You're not allowed to request books or materials at all from any type of distributor?

A I had to go through a grievance process just to get some books, because the chaplain tried to tell me that they didn't have any Islamic books and I wrote a grievance and a sergeant

went down there and came back with a big stack of Islamic books.

Q Okay. You were provided a mailing address of a distributor in New York by Chaplain Banks earlier this year, correct?

A For the purposes of getting a Koran, yes, ma'am.

Q Okay You're able to request a pork free meal, correct?

A Yes.

Q Okay. You are able to observe the religious holidays that you choose, correct?

A That's correct.

Q Okay. You're able to participate in Ramadan?

A Yes, ma'am.

Q All right. You are able to or entitled to have a spiritual advisor, correct?

A Yes, but I don't get access to them.

Q Okay. You are -- can you correspond with one if you have a spiritual advisor?

A I've attempted to. My correspondence is not answered.

Q Okay. You were able to seek a name change in the Pulaski County Circuit Court, correct?

A Yes, ma'am.

Q All right. And you are also in possession or have been in possession of a prayer rug, correct?

A Yes, ma'am.

Q Okay. So, would you now agree with me that there are ways, other than observing whether or not you are going to shave your beard, that you are entitled and allowed to participate in various forms of adhering to and participating in your religion?

A That's correct, but I want to add -- I want to add that those things alone -- you have to do everything with a totality of the circumstances. If the Prophet Muhammad commanded that a Muslim is to clip his mustache short and leave the beard as it is, it is incumbent upon a Muslim to do that. If he fails to do that, it is my belief, and according to the Koran, that he is disobeying the Prophet Muhammad, sallallahu alayhi wa sallam, and he's also disobeying Allah [indiscernible] Allah.

Q Okay. You would agree with me that that is your interpretation, correct?

A No, that is not my interpretation. That's Hadith.

Q Okay.

A That -- that is sound Hadith. That's why I put that in this complaint and keep referring to it is because of the fact that it is sound Hadith. The Hadith is important to follow because we are to emulate the Prophet Muhammad, sallallahu alayhi wa sallam, as much as possible. And if the Prophet Muhammad said to do it, we are to do it. The Hadith says so. The Hadith is sound. And I -- and I try to strive to emulate

the Prophet.
Q How long have you been of the Muslim faith?
A Nine years, going on ten.
Q And when you were charged with the most recent crimes that you entered the Department of Correction for, were you a practicing Muslim?
A Yes, ma'am.
Q Okay. And I believe in your pleadings that you have acknowledged that the Arkansas Department of Correction has a legitimate penological interest with regard to having a grooming policy, correct?
A Yes.
Q Okay. You just disagree with whether or not it should apply to you and whether or not you should be limited with the length of your beard, correct?
A I'm going to put it like this to you, I want to be protected, too, because I'm an inmate in the Department of Correction. There are other -- there are other ways that people hide weapons on them. The facial hair alone is -- is not where people most of the time are going to hide weapons.
Q That's because they're not allowed to grow facial hair, correct?
A That's correct.
Q Okay.
A But they could hide them someplace else. They could hide

them on the clothes, you know, that type of thing. Having a half inch beard -- having a half inch beard, again the issue is whether a half inch beard is going to cause a security concern in the Department of Correction. I have proven by walking the halls of Cummins Unit for almost three months with a half inch beard that there is no security concern. There has been no -- been no issues, as far as I know, complaints, other than staff not liking the fact that I have a beard. Other than that, there has been nothing on my end for having done anything like that.

Q Okay. So your position is that because you have chosen not to hide any -- or attempt to anything in your beard, that is not -- it does not create a security concern?

A A half inch beard would not create a security concern. More than one court has ruled on that.

Q Where did you come up with the half inch requirement?

A From --

Q And I ask this because in your memorandum of law you say that your belief is that you should leave the beard as it is.

A That's correct.

Q So I'm trying to figure out how do you justify now coming up with a half inch beard? Is it because --

A As --

Q -- of the Ninth Circuit case law?

A As -- as the Prophet Muhammad again has stated in the

Hadith that for every travail there is two escapes, if -- if you are in a position -- if a Muslim in a position where the lesser of two evils are involved, it is permissible to go with the lesser of that evil. If the evil requires that you observe -- to a certain extent if you are observing the -- the -- with your intention, which is called your niyyah, to grow the beard, if it is your intention to leave it uncut, then according to the Hadith, the 40 Hadith Qudsi, it states that -- that if you intend to do a good deed, but don't do it, it's still credit to you as a good deed. So if I have -- to a certain point here, have made an effort to comply with the dictates of the Prophet Muhammad, sallallahu alayhi wa sallam, then I have done what I'm supposed to do. And, yes, the half inch beard did -- did come in to play in that Ninth Circuit case.

Q Okay. So you arrived at the half inch beard requirement based upon the Ninth Circuit case?

A Because it seemed reasonable, yes.

Q Okay. And I believe that you also just said that based upon your -- based upon your beliefs, that if you try to do the right thing, but are not allowed to do it, that that's still acceptable, correct?

A That's correct.

Q Okay. So if you tried to grow a beard of any length, and the Department of Correction said no, as far as your religious

beliefs go you're still okay because you attempted to comply with that, but you were stopped by the laws of the Department of Correction?

A If it was under compulsion, to a certain extent, yes.

Q Okay. Now when you filed your motion for a temporary restraining order, you filed that in June of this year, correct?

A Yes, ma'am.

Q Okay. And you had not received a disciplinary for failing to comply with the grooming policy since the previous July, correct?

A That's correct.

Q All right. And at some point after you received those disciplinaries back in July of 2010, you acknowledged at one of those disciplinary hearings that you had been following other law, but that you acknowledged that you were now incarcerated in the Department of Correction, that you needed to follow the laws of the Department of Correction?

A That's what I stated at the time.

Q Okay. What changed? Between July of 2010 and June of 2011, what changed?

A Several things changed.

Q Okay.

A Do you want me to go into them?

Q Please.

A Given the stuff that's happened in the Muslim world, the -- the occupation of Afghanistan, Iraq, places like that, when I see brothers being murdered in those countries, when I see them dying for this type of stuff, at this point it -- it comes -- it makes me want to continue to try to follow the religion as much as possible, because there's brothers dying for this very thing over there. They're dying for these beliefs. And for me to sit over here because some prison administration thinks that, oh, well, you know, we don't think he should grow a beard because it's a security issue, never mind what his religious beliefs are, we're not going to try to accommodate his religious beliefs at all as it relates to his belief in growing the beard, at that point my -- you know, I'm -- I believe I have every right to challenge that. And that's what I've done.

Q You don't have any case law with you or anything showing that the *Fegans* case is no longer good law, do you?

A That it's no longer good law?

Q In the Eighth Circuit? Yes.

A Not that I'm aware of.

Q Okay.

A My -- but what I would like to point out again is that the problem with the *Fegans* case was that Michael Fegans argued for unrestricted beard and hair growth. I am only arguing for a half inch beard because that right there is -- is still

contributious to the security and good order of the institution. There is no problem with a -- somebody growing a half inch beard. In fact, in some other cases, the courts have ruled that -- that the -- that correction personnel can exercise common sense and visual inspection to determine whether or not there is a -- a weapon or any type of -- any type of contraband there, that they're trained to do this.

And also, the issue is, is that since it's been argued that having a beard can help alter your identity should you try to escape, I would be willing to go so far as to say that -- that the Department of Correction can practice what other, like the New York Department of Correction does, when they come in, they -- you take a clean shaven photo, and then they allow the -- they allow them to grow I believe in New York it's a one inch beard, they take another photo of them at that point, and that way they have them for comparison purposes. And, in fact, there -- it's been stated in some of these cases that -- that the issue of the weapons is not something that's that big of an issue as far as putting it in the beards, that they're using -- they can hide them anywhere else on the body.

Q They can also hide them -- if allowed to wear a beard, they can also hide them in a beard?

A If they allow the beard to grow unrestricted. You cannot hide anything -- again, Ms. Cryer, you cannot hide anything in this beard. You can't stand there and tell me you can hide

something there.

Q You might not be able to, Mr Muhammad, but other inmates might be able to if they were allowed to grow a half inch beard?

A A half inch beard, this -- this right here is getting close to a half inch beard. You can't even barely hide a razorblade in it, Ms. Cryer

Q Well, actually, let's talk about that for just a little bit. When is the last time that you received a haircut?

A When is the last time I received a haircut?

Q Yes, sir.

A The last time I got in the barber chair was about three weeks ago.

Q How did that go?

A I went down there to get the beard within compliance of what I said I would wear a half inch beard on, because it was getting a little scraggly, so I was getting in the chair to have it trimmed up, and the barber tried to shave it nearly all the way off.

Q What happened then?

A After he was told twice not to do it.

Q What happened then?

A At that point, I informed -- I informed Warden Warner and Major Robertson that -- that I had a problem with the man and that he couldn't come around me anymore.

Q What exactly did you say with regard to you have a problem with him?
A I said I was at war with him.
Q Okay. What does that mean to say that you're at war with him?
A I have -- I have an issue with him, but I -- I went on to explain to Captain Tate when he asked me what I meant by that and I wrote down in the witness statement that I did not intend that as a threat, that was not a threat, it was spoken in the heat of anger, I was upset at my beard being shaved off -- nearly all the way off after I told the man three times that I had a court order allowing me to grow a half inch beard, to trim it down to a half inch, and he tried to shave the whole thing off.
Q So you don't want to be shaved or cut by that barber again, correct?
A That's correct.
Q What happens if the next barber tries to cut your beard below where you want it to be, are you going to be at war with that barber as well?
A I would be upset with him, but I have to -- I have to -- I have to temper my viewpoints at times because I do hold very stringent beliefs when it comes to the beard situation. When it comes to this religion, I hold it very, very seriously
Q So I guess my question is are you going to threaten the

next barber that cuts your hair or your beard in a way that you're not happy with?

A There was no threat there. As I said, I did not intend it as a threat, I did not threaten that man. All I said was I was at war with him. You can take those choice of words to mean how you want to because --

Q Did you mean that you thought he was a friendly, swell guy and that that's why you were saying you were at war with him?

A All I said was -- and the reason that I had an issue with him was because he tried to cut my beard off after I told him twice not to.

Q And again, that -- the barber was an inmate, correct?

A Yes, ma'am.

Q Not an officer?

A Right.

Q Okay

A I would point out that the officer that was on duty that day took me down there to the barber chair and told the barber -- told the barber this man needs a shave. And I told him when he started getting the clippers out, I told the man cut my beard down to a half inch length, I have a court order that says I can do so. And instead, he goes and takes nearly the whole thing off.

Q Again, the inmate does, not the officer, correct?

A That's correct.

MS. CRYER: Okay Your Honor, I don't believe at this time I have any more questions of Mr Muhammad.

THE COURT: All right. Sir, you may stand down. Thank you.

THE PLAINTIFF: All right.

(Witness stands down.)

THE COURT: Sir, did you have any other evidence that you wanted to present at this time? Because now what I believe should happen is I believe that it's the defendants' burden to show that -- well, essentially, answer the question of whether security can be achieved while not substantially burdening your -- is it impossible for them to achieve security without substantially burdening your free exercise of religion, so, I mean --

THE PLAINTIFF: There is one other thing, Your Honor, I would like to bring out. I made an effort before we came here today to deal with this issue about whether an injunction was necessary or not. I wrote a letter to Ms. Cryer and informed her that I would be willing to stay in ad seg, to stay in administrative segregation, and as long as I'm allowed to grow that half inch beard, you know, I -- you know, I wouldn't be walking the hallways, I wouldn't be doing anything like that, so, therefore, it wouldn't be an issue out in the population, if that was that their position. I offered to try to negotiate that. But I heard nothing back, so I thought I

would let you know that -- that I did try to do that.

I would also point out to you that even though there has been a restraining order in place, that I've still been subjected to harassment on the part of ADC staff at various times. In fact, being locked up in ad seg under investigation on the grounds that Major Robertson stated that I had been in the law library and had typed a order up on the law library computer When I told him that the order was valid, he tried to state that I had forged Judge Miller's signature. Even though I was let out of the segregation several hours later, after it was determined that the order was in fact valid. Going down the hallway -- I even had to go and ask Warden Warner for assistance because I would carry the order in my pocket because certain shifts weren't notified that the order was in effect and that I was allowed to wear the beard, so officers and people in positions of authority would try to harass me and threaten to lock me up for having the beard and would say they didn't care what the order said, they didn't care that -- if it came from a federal judge or not, this was the Department of Correction, this wasn't the feds. So I had to go again to Warden Warner and asked to -- for him to re -- to put another memorandum out to tell these people to leave me alone because it's a valid order. I couldn't even go to breakfast in the morning times because I was being harassed by staff in the hallways. So I thought I would -- I was bringing

it out to you that -- you know, that an injunction really is needed on this. It really is, because of the fact that, as you can see, this beard right here -- this beard right here, you can't hide anything in it. It is -- it is a -- it is a belief of mine that you should grow it out, the state would not be harmed by -- by you continuing that injunction. If the injunction only applies to me and not the rest of the ADC, again, I don't -- I don't see how there would be a problem in that regard either, because if I'm the only one that's allowed to -- that's allowed to do this, then I don't see that there's going to be 16,000 inmates walking around the ADC with half inch beards on their faces.

THE COURT: Well, let's let the defense proceed. You're getting a little bit ahead, you're kind of making your argument in closing. And so, let me hold off on that.

And on the ad seg, wasn't that proposed by the *Fegans* -- in that case, was that the -- I thought it was proposed as an alternative in *Fegans* and the Eighth Circuit rejected that as unduly burdensome on the ADC.

MS. CRYER: I was going to say, Your Honor, I would like to respond to what Mr. Muhammad said and it also may be necessary that I question him a little bit further based upon what he has just testified to.

With regard to the ad seg, I mean, Mr. -- first of all, Mr Muhammad placed himself, requested to be placed in ad

seg. It was not a matter of the Department of Correction placing him there. He did send a letter I did receive it last Friday. Due to the holidays, he has not received a response back for what we consider to be a settlement offer

I think that based upon other cases that have been decided recently in the Eighth Circuit with regard to housing someone in ad seg for an unlimited amount of time, I don't believe the Department of Correction -- that that's something that they could seriously consider doing without facing potential lawsuits of Mr Muhammad being housed indefinitely in administrative segregation. So I don't think that's a fair --

THE COURT: It was proposed in *Fegans*. I know I've read that. It was proposed in *Fegans* and the Eighth Circuit has rejected that because it says:

> "This option, like the others proposed by *Fegans*, would allow accommodation of religious observances to override other significant state interests, we agree with the district court that AD 98-04 withstands scrutiny under RLUIPA."

So, I mean, that was proposed before and the Eighth Circuit, they rejected that over the objection of the defense.

But your point is well taken, Mr. Muhammad, and again, I want to -- I think, you know, if we can -- the issue here, you know, really is so closely related to the merits of the case, and that's not why we're here to ultimately have a disposition of the case. But, I mean, to me, and ultimately it boils down to whether or not the -- whether or not we can have the ADC meeting their security objectives without substantially burdening your religious freedom. I mean, that's it in a nutshell. And so it really is incumbent on them -- the way it works, Mr. Muhammad is that they have to ante up now, they have to say we can't do it, we can't allow you to grow this beard because of whatever the reasons are. I know what the reasons were in *Fegans*. I'm interested to hear what the reasons are now. And then we'll just have to, you know, see what happens. I mean, I'm going to hear from them right now. But I want to stay focused on that line of thinking here, because that, to me, is the critical part of this, what are the security concerns that they have. And again, you know, Mr Muhammad, the law, as you know -- I mean, you've obviously read these cases -- but, you know, in general, the law is very much restrictive on me getting involved in prison administration. Okay. And frankly, I mean, that's -- you know, they don't get involved in the judging business and I don't get involved in the prison administration business. Okay. And there's a reason for

that. You know, I'd be a lousy prison administrator. And they have the experience and the knowledge, and, you know, I'm sure a lot of times you disagree with the way they do things, but the bottom line is they're the ones trained in doing that and I'm not entitled to, under the law, to meddle in prison administration unless it somehow infringes on your constitutional rights. And so, I'm -- what I'm trying to say here is the thrust of this has to be on what are the security concerns, can they achieve concerns and still allow you to grow a half inch beard or not? And so, that's really where I'm focusing Okay?

And I don't know, you know, what the answer is, but we haven't heard from Ms. Cryer and her folks. So let's hear what they have to say And you'll have every opportunity to cross examine them and build your record. And then we'll see where the chips fall. Okay?

THE PLAINTIFF: Okay.

MS. CRYER: Thank you, Your Honor I'd like to call Warden Gaylon Lay.

GAYLON LAY, DEFENDANTS' WITNESS, SWORN.

DIRECT EXAMINATION

BY MS. CRYER:

Q Mr Lay, would you state your full name for the record, please?

A Rex Gaylon Lay.

Q And where are you currently employed, Mr. Lay?
A Arkansas Department of Correction, Cummins Unit.
Q And how long have you been the warden at the Cummins Unit?
A Going on nine years.
Q And just to make sure, you are aware today that we are here with regard to inmate -- I'm going to call him Gregory Holt, because I believe that that's the pleading that the name was filed under, but he's also going by the name -- last name Muhammad?
A Yes.
Q That we are here with regard to his request to ask this Court to allow him to be able to grow a one half inch beard; is that your understanding?
A Yes, ma'am.
Q Okay. Mr Lay, let me just start off by asking you do you have any problems or concerns with inmate Holt or inmate Muhammad being allowed to grow a one half inch beard?
A I do. Yes, ma'am.
Q Okay. Would you please explain to the Court what some of your concerns are?
A My concerns revolve around security. A person can quickly alter their appearance if they're allowed to grow a beard, they escape while they're out on a court run or from a facility or whatever, and immediately shave. They alter their appearance. There are some differences, for example, if you

look at Mr Muhammad's beard, his is rather thin on the sides and kind of thick around here, he may or may not be able to hide something as simple as a homemade dart, I'll just use that for an example, we have over the years found some of those at another facility, but other people, individuals, are different, the next guy may have a half inch beard that's full and -- full face. I mean, there are just a large number of variances in different people when it comes to facial hair.

Also, you're -- I don't know how you would -- I don't know how you would manage that if people were allowed to grow a half inch beard. Okay. How are you going to measure that on a consistent basis? How are you going to keep down conflict?

At the current time, the only person I'm aware of, out of over 15,000 inmates, that has a legal order to grow a beard -- now, there are some medicals for a quarter inch beard -- but to grow a half inch beard is inmate Holt. And as you can see from his own correspondence, he's already threatened the barber over the manner that he cut his hair Can you imagine trying to manage that for 15,000 people?

Q Okay. Well, even if we're not talking about other inmates, let's discuss inmate Holt. How often are inmates allowed to go and to get a haircut and a shave?

A Weekly, at least.

Q Okay. Let's say --

A If they're in general population, they are actually issued

a razor They keep it in their personal property.
Q All right. And what about Mr Holt or Mr Muhammad who has placed himself in administrative segregation?
A Weekly.
Q Okay What if any time during that week, let's say, Mr Muhammad chooses to go every two weeks or every three weeks to the barber, do you have any concern as to how that shaving process or that is going to go based upon past experience with Mr Holt and what happened with the barber earlier this -- earlier -- or last month, in December?
A Well, certainly, I do. I mean, if -- if Mr. Holt sits in a barber chair and says I want a half inch trim, which would be in compliance with the order he currently has, I guess, how is that barber going to determine, okay, you know, this is exactly a half inch, it's a little longer, a little shorter? Even if it's exactly what he ordered, are they going to be in agreement over that? And you've seen the result and the documentation of what occurred that one time.
Q And, to your knowledge, what was the documentation and what did occur with Mr Holt and the barber in December of 2011?
A According to the inmate barber and the officer that was there, Mr. Holt asked if he could go to the barber chair, as the officer was making his rounds for haircuts, and get a trim. And the officer took him to the barber chair, as he did

everybody else that requested it on the wing. And when the guy -- when he sat down, according to the inmate barber, he never told him anything about a particular length or anything until after he had shaved him with the clippers, and he said then Mr. Holt acted as if he was angry, objected, said, you know, I'm supposed to be able to keep a half inch beard. And the barber said I wouldn't have had a problem with that, or I would have at least asked staff if that was the case, had he mentioned it. But the inmate said he never mentioned that until after the fact.

Q When an inmate is receiving a haircut or a shave from an inmate barber, is security staff located inside that area or around that area?

A In segregation, yes, the officer escorts him there and stays in the vicinity until he escorts him back to the cell.

Q How far -- you just said stays in the vicinity, what is the vicinity?

A Within three or four feet.

Q Okay. Would you have any concern with security needing to be present or even additional security needing to be present every time inmate Holt goes to the barber chair?

A After this particular incident, yes.

Q Okay. Any concerns about inmate Holt being around the inmate barber that gave him, for better words, the wrong cut of the beard last month?

A Certainly. I mean, the statements that he made were obviously a threat. We perceived them in that way and have taken precautions not to allow that barber around inmate Holt again.

Q Okay Can you do that every time inmate Holt has a disagreement with a barber, can you just switch barbers out?

A No, ma'am, I think eventually I'd run out of barbers if I tried to satisfy what Mr. Holt wants or Mr. Muhammad.

Q And again, with regard to the length of the beard that he is requesting, how would you monitor or how could your unit or the department, for that matter, monitor how long exactly his beard is each and every day?

A I'm not sure. Someone would have to show me how to do that.

Q Okay.

A I mean, you could start, I guess, with a particular clipper guard that's a particular length, but depending on the individual, in two, three days, how frequent is he going to have to trim that and how are we going to know that? You see them going down the hallway, but you obviously can't stop and pull a tape measure on everybody's beard, I wouldn't think.

Q Let me ask with -- Mr Holt mentioned something about not being able to hide contraband in his beard. Do you know, have you observed whether or not inmate Holt has attempted to put anything in his beard to see if it would stay or if it would

fall out?

A I have not, no, ma'am.

Q Are there any forms of contraband that you, as the warden, would be concerned about possibly being placed in a beard that was a half inch long?

A Certainly. And again, depending on the individual, some individuals would have more ability to hide something than others, depending on how their facial hair grows, the thickness of it, et cetera, and that sort of thing.

Q What types of things?

A Anything from razor blades to drugs to homemade darts. I mean, there are a wide variety of things. Those are just what I think of off the cuff. Inmates are pretty creative and they have 24 hours a day to think about things like that.

Q Okay. Well, what about Mr. Holt's statement that he can't hide anything in his beard -- I don't know how else to ask this -- but is that good enough for you?

A No, ma'am, I don't believe -- I don't believe it would be.

Q Does that provide you with comfort knowing that Mr. Holt is not going to hide anything at any time or attempt to hide anything at any time in his beard?

A It does not, no.

Q And is that opinion based on -- what is that opinion based on?

A Based on experiences and -- and experiences in dealing

with inmates over the last 36 years.

Q And with regard to an inmate changing his appearance, can an inmate change his appearance other than shaving or growing a beard?

A I suppose. I suppose they could shave their head, but that's just one more avenue that you've added to the possibilities.

Q And I believe you heard Mr. Holt's testimony that he knows for a fact that inmates hide a lot of contraband in their hair on top of their head?

A Yes, ma'am, I heard that.

Q Are you concerned as the warden at the Cummins Unit about contraband being passed along from inmate to inmate at your unit?

A Certainly, I am. I mean, we spend an astronomical number of hours conducting searches, housing area searches, random individual inmate searches, all sorts of things. And still, occasionally, you're going to find contraband.

Q Over the years, and I'm going to use the year 2006, and I'm picking that year because that was the year that Judge Moody issued his ruling in the *Michael Fegans* case, from 2006 to the present time, based upon your knowledge and experience, has the amount of contraband that inmates have been caught with or discovered with at the Cummins Unit, has that decreased at all?

A No, ma'am. As a matter of fact, it has increased. The population and the type of inmates we seem to be getting from society now are more violent, they're younger, there are just a gambit of things that make them different than the population we were used to dealing with in the 70s and 80s.

Q And what if you -- what if you have an inmate who is allowed to do something special, that he is allowed to do something that other inmates are not allowed to do, such as grow a beard, even if it's a restricted length beard, but is allowed to grow a beard, do you have any security concerns for the safety of that inmate?

A It could possibly make him a target of other inmates. Yes, ma'am.

Q And, Warden, let me ask, the current policy of the Department of Correction, the Court made reference to the policy 98-04 earlier with regard to the policy that was in the *Michael Fegans* case, to your knowledge, is that the same policy that applies today with regard to the grooming policy?

A Yes, ma'am, that's not changed to my knowledge since --

Q Does the -- sorry.

A -- that time. I'm sorry.

Q Does the grooming policy make any allowances for any type of religious exemptions?

A No, ma'am.

Q Okay. As warden of your unit, have you personally done

anything or have you instructed anyone to prevent inmate Muhammad from having religious articles or materials with him that he feels are important in order to facilitate his religious studies?

A No, ma'am. There was one thing that occurred, an individual tried to send him a Koran through the mail, and we searched the inmate's property and -- and discovered that he had three in his possession currently, and it's against policy for it to come from an individual, he would have to order it from a bookstore or a business that provides that type of literature.

Q What happened to the Koran that was sent to you from the outside individual?

A We mailed it back to the individual that sent it.

Q Okay. And was that based upon your desire for inmate Holt or inmate Muhammad not to have a Koran to study with?

A No, ma'am. As a matter of fact, that's why we searched him, was to make sure that he did have one before we denied it, and we, of course, would have had the chaplain guide him in the correct way to get one. We still would not have been allowed to let him have the one that came from an individual.

Q Why can you not allow him to have something that came from an individual?

A People offer them, we get all kinds of things in the mail that shouldn't come in a correctional institution, that are

concealed in mail, books, religious materials, different things.

Q Do you allow or does your unit allow inmates to request certain religious materials from distributors that are accepted and approved by the department?

A Yes, ma'am, and they can work through the chaplaincy's office and gain access to those addresses and places that are available.

Q Okay. And again, with regard to administrative segregation, inmate Holt mentioned that he would be willing to stay in ad seg, do you have any understanding or knowledge as to why inmate Holt is currently in administrative segregation or was in administrative segregation?

A He had chosen --

THE PLAINTIFF: Objection. I object to that because the person who could testify to that is here. So it would be hearsay from what he's saying.

THE COURT: Well, at this type of hearing, I think hearsay is allowable under the Rules, so I'm going to allow it. And then if you want to call the other witness, if there's any -- if there is any question of -- well, let's hear what he has to say. I mean, if there's a question of whether or not it's accurate or not, you can call the witness, because that's your hearsay objection, it's based on accuracy

THE WITNESS: He's in segregation this last time

because he requested to be there in writing.

BY MS. CRYER:

Q Okay. And Mr Holt testified a few moments ago that he was being harassed by officials at the Department of Correction with regard to the order saying that he could grow a half inch beard. Mr Lay, have you done anything to harass inmate Holt with regard to his order not being allowed to -- or to allow him to have the half inch beard?

A No, ma'am, I have not, nor have I instructed anyone else to.

Q How did you learn about the order that inmate Holt had that would allow him to have a half inch beard?

A I received a call. I was actually off, I think on vacation. I received a call from the duty person. I don't remember if it was Mr. Warner or Major Robertson. But Major Robertson had stopped inmate Holt in the hallway because he was out of compliance with the grooming policy and was going to write him a disciplinary. And inmate Holt presented the order that he had from the court. And, of course, being corrections folks, we were a little bit suspicious about its authentic -- about it being legitimate, because normally anything the court issues, we get, at least, a copy of. And normally, we'd get it before the inmate, I would think, usually. So that seemed extremely unusual. And I think the major did place him on investigation, and then after it was

authenticated, released him from segregation.

Q Do you know what time period it was that inmate Holt was kept in segregation or on investigative status?

A It was released the same day.

Q Okay.

A I don't know if it was an hour, two hours, or three hours.

Q Okay. Is that how you first became aware that there was an order allowing inmate Holt --

A Yes, ma'am, that was the first --

Q -- to grow a beard?

A -- first I'd heard about it.

Q Okay. And I believe Mr Holt testified earlier about how if he was not in compliance with the grooming policy, that he faced the possibility of being issued a disciplinary for being out of compliance with the grooming policy?

A Yes, ma'am, that's correct, as was any other inmate.

Q Is being out of compliance with the grooming policy the only infraction or rule violation at the Department of Correction that an inmate can be issued a disciplinary for?

A No, ma'am. There are numerous. As a matter of fact, Mr. Holt directly reflects that. I mean, he's had some for threatening folks, I think, and some various things.

MS. CRYER: Your Honor, I believe at this time that's all the questions that I have of Warden Lay.

THE COURT: Thank you, ma'am.

Mr Muhammad, you may ask.

CROSS EXAMINATION

BY MR. HOLT A.K.A. MR. MUHAMMAD:

Q Good morning, Warden.

A Morning.

Q Get back to something that you were saying when you first started out. The reason I'm in ad seg is not because of the fact that I requested it, is it, Warden?

A Yes, I believe it is. I believe we have a written statement to that effect.

Q In fact, I was assigned by the classification by Warden Warner, was I not, regarding a disciplinary I had received, written by Warden Weekly; is that correct?

A Not --

Q Were you not aware of that?

A Not this time. If I remember correctly, you've been out of segregation and back since that disciplinary Is that not correct?

Q That's correct.

A Okay. This time, based on your request.

Q And did I also not, two days later after that, ask to be returned back to population and stated the issue that I had had been resolved and I wanted to go back to population; were you aware of that?

A After you were placed there this time? Are we speaking of

the time that you're there now?
Q After I requested it, yes.
A No, I'm not aware of you requesting to go back to population.
Q So you're not aware -- you're not aware then that there was an objection to my going back to population by one of the defendants in the case; were you aware of that?
A No. No, I was not.
Q Okay Now, on the issue of the barbers, how do you choose who is designated a barber and who works as a barber at Cummins Unit?
A Classification Committee selects them. As they come through classification, we try to place people in areas where they have job skills. If a guy comes through and says he's been a barber somewhere, particularly if he's a licensed barber, you don't run across many licensed barbers, but you do run across some people that have cut hair and had experience in that area, then they would be considered for that job.
Q Now, would the two barbers that you have come in to ad seg or 14/16 Barracks in the east building, are -- are both of those trained barbers?
A I couldn't testify to their training without talking to the individual and looking at their institutional file. I do know that the last barber that was in that area has been promoted to the free line barber and cuts staff hair.

Q So the barber that -- that you discussed, that we discussed in here, that I've had the issue with regarding a beard trim, you don't know whether he's a trained barber or just -- just somebody that the classification said, okay, he says I want to be a barber, I want to be a barber?

A I think I answered it, but I'll answer it again. I couldn't testify to that without talking to the individual or looking at his institutional file.

Q Now I want to ask you about the situation where you stated that you -- you talked to the barber in question, the one who shaved -- nearly shaved my beard all the way off, you talked to him and he told you that I never requested or said anything about a half inch beard until after the fact; is that what you're saying?

A That's what he told me, yes, during the interview.

Q Now, would you -- would that -- could it be a possibility that based on the situation and based on the information that you had, knowing about this court order, that when this barber was confronted with this -- because there was a grievance written, was there not, by me?

A I don't remember -- I don't remember if it was a grievance or just a written complaint, but, yes, that's how I became aware of it, was something that was received from you.

Q Now, is it possible the barber lied?

A Sure, that's a possibility.

Q So just because the barber said I didn't say anything, doesn't mean that I didn't say anything, correct?
A Well, the officer, I believe, kind of corroborated what the barber said, and that he didn't hear you say anything about that to the inmate barber I talked to -- I talked to every individual that was in that area after receiving your mail.
Q Did you -- when you talked to the officer, do you remember which officer it was?
A I don't remember his name right offhand, no.
Q Did he state that -- did he tell you where he was at during this whole -- during this whole episode at all?
A He said he was in a close vicinity -- close proximity, three, four, five feet, somewhere in that horseshoe there -- or that area where they cut hair, not the horseshoe, but I think it was in one of the day rooms if I remember correctly
Q So if you hear -- let me ask you this. If you hear two inmates into a conflict, especially one in handcuffs and one not, one has got access to sharp weapons, the other one doesn't, if you hear -- that if an officer hears two inmates in a conflict, wouldn't it be the officer's duty to remove -- to separate those two inmates so that the conflict is squashed?
A Well, I believe that's what occurred. You were taken back to your cell immediately following the incident, were you not?

Q Yes. Were you aware of -- or let me ask you this. Were the COs that were back there in the east building, were they made aware at all that there was a court order in place regarding me and that I was not to be bothered regarding the beard at all?

A I know the captain and the major knew that. I hope they passed that information on to the correctional staff. I have to believe they did, as no one has written you a disciplinary for being out of compliance with the grooming policy.

Q Okay. Now you mentioned about inmate identification as it relates to beards; is that correct?

A Yes.

Q You're concerned that if inmates were allowed to grow half inch beards in the ADC that they will be able to alter their appearance and -- should they escape or anything like that?

A Certainly.

Q Wasn't there an escape recently at Cummins Unit, sir?

A Yes, a couple of years ago.

Q And those inmates that escaped were actually dressed like officers, were actually in compliance, like officers would wear, with their -- with their facial hair neatly trimmed, no beard and that type of stuff, would that be not -- would that not be accurate?

A That's correct. Yes, they were dressed as officers.

Q So a beard alone is not going to cause somebody to be able

to necessarily alter their appearance, the lack of it, or to have one, in the event they want to escape, they can alter it some other way, right?

A Well, certainly, there are many ways you can alter your appearance, I guess, but a beard being one of the easiest and quickest.

Q Okay And you mentioned about the -- your concern about weapons being hidden in the facial hair, I believe you mentioned darts, I believe you mentioned razor blades, things of nature; is that correct?

A Yes.

Q Would it be safe to say that the weapons that you have found during shakedowns in Cummins Unit, the times that you have found them, are either -- or have they ever been on somebody's face at all?

A No, because we have a grooming policy They don't have beards.

Q Okay So -- so the weapons are other places, correct? They're on their clothes, in their rack, wherever, they can hide them any number of places in other than just the beard, correct?

A We find contraband various places, yes.

Q Okay. So just having a beard alone is not going to -- is not going to cause a great increase in the flow of contraband, is it?

A It'd cause a great increase in the number of places to hide it.
Q So you would say then that -- that even though there's the clothes, the socks, the shoes, the boots, things of that nature, the coats, any number of clothings that you all issue at Cummins, people hide stuff in there regularly, correct?
A They have, yes.
Q So, again, a beard is not going to be necessarily the -- the preferred choice of hiding things, wouldn't you say?
A Well, now, that depends. You know, inmates are pretty creative, as I stated earlier They watch staff, watch how they monitor things, watch what staff do. And after watching a particular staff person on a post for a period of time, that's how they figure out how to beat that staff person, about what they are checking and what they're not checking, what they may not be comfortable with checking. I don't know how many correctional officers would be comfortable with running their hand through a man's beard. I don't know. You know, but I really don't think that that would benefit the overall goal and mission of corrections to have to do that.
Q Now, you have other ways to identify inmates, don't you?
A Such as?
Q Do you not -- is it not policy -- is it not policy of the Department of Correction to issue inmates IDs that they wear around their neck and also put their name and their ID number

on their clothes; is that correct?
A Yes, they carry an ID badge. That's correct.
Q So, and they also have their name and ADC number on the back of their -- the front and back of their clothes; is that correct?
A Yes.
Q So you can -- you can identify -- the purpose of that is so that you can more readily identify those inmates in the case of an officer having a contact with them, correct?
A We put a name and a number on the clothing hoping that they'll continue to wear the ones that are issued to them and not trade them out, but, no, that's not -- that's not a very good method of identifying anyone, no.
Q So what happens if they're caught wearing clothes they're not supposed -- that are not issued to them?
A Will get a disciplinary, unless for some legitimate reason their clothes were not back from the laundry or something.
Q And you issue -- you issue ID cards; is that correct?
A That's correct. Yes.
Q And the reason that you issue cards, such as these right here, is so that you can again readily identify inmates in the department -- in your unit, would that be correct?
A Well, yes, if we issue the ID badge though of you without a beard, and then three months later you grow a beard, then you've altered your appearance from that ID badge.

Q So let me ask you this, how --
A And vice-versa.
Q -- how many years have you been -- again, did you say you've been a warden?
A I've been a warden at the Cummins Unit for nine and at the Delta Regional Unit for five.
Q Okay. And you're aware -- are you in contact with other Department of Corrections around the country; do you ever have any contact with them at all?
A Yes, occasionally, through training, we do through the American Correctional Association and other avenues.
Q So if other prisons, major prisons, such as New York, California, places like that, if they're able to do this very same thing that I'm proposing, why would it be so hard for Cummins Unit to do the same thing?
A You know, I suppose maybe that's an individual preference in those states. I can't tell you for what reason they've elected or chosen to go that route. I do know that many, many of those institutions are very different from Cummins and from the mission, and I'll give you one good example, is the majority of those institutions that you're referring to are cell block housing units where everything is one or two man cells practically. The Cummins Unit has a lot of open bay barracks that house up to 35 to 45 individual inmates, it's as high as 50 in some instances. So, yeah, that's just one of

many scenarios that are a lot different from our mission and the way we're designed as opposed to maybe somewhere you're talking about in California or -- or New York. I'm not aware of very many states out there, for example, that operate an agricultural program like we do in Arkansas. The Cummins Unit is attached to a 17,000 acre farm. There are a lot of people come and go in and out of the confines of that fence performing that work and those duties. So we're certainly a lot different. So I don't know why, you know, their preference would be to go that route, but, I mean, that's their preference obviously, or maybe law in that particular circuit, I don't know.

Q But if they're able to do it without problems and they -- they seem to be able to be getting along fine, what would be the problem with the Department of Correction allowing somebody to grow a half inch beard?

A The problem would be the reasons that I've stated. And I certainly would like to talk to some of those administrators and see if they didn't voice some of the same concerns even though they do allow that.

Q Now, you were saying there's how many -- how many inmates, rough estimate, are in the Department of Correction as we speak right now?

A Excess of 15,000. It may be up closer to 17.000 currently.

Q Now, of those 15,000 inmates, would it be fair to say that not everybody can grow a beard, right?
A Right now, no one can except yourself and those that have a medical script.
Q The question I'm asking you though is would it be fair to say that in the Department of Correction that should -- should this Court or whoever in the future so find that we should be allowed to grow a half inch beard, that not everybody in the ADC can grow beards; is that correct?
A Do you mean physically?
Q Physically grow beards.
THE COURT: I understand where you're going with that, Mr Muhammad, but why don't we move on. I understand where you re going with that. I don't think it's very compelling on what you're trying to prove.
THE PLAINTIFF: Okay.
THE COURT: And equally, I didn't find it very compelling that having to manage 15,000 people with beards is at issue either, so.
THE PLAINTIFF: Okay
BY MR. HOLT A.K.A. MR. MUHAMMAD:
Q Would it be fair to say again that it would be easy to hide weapons or contraband in the head hair?
A Could you repeat the question?
Q I said would it be easy -- would it be fair to say that it

would be easy to hide contraband in the head hair of an inmate in the Department of Correction?

A It would be as easy to hide it there as it is a beard, I suppose.

Q Okay So if somebody has hair my length or a little longer on top, you could hide a razor blade in that, you could hide weapons and stuff up there, couldn't you?

A You could, yes.

Q Okay. Now, the issue of ID-ing inmates as far as with the beards, what would be the harm, okay, in allowing when somebody comes into the ADC, requiring them to have a clean shaven photo taken, and then when they grow it out to a half inch beard, taking another photo of them for comparison purposes?

A The problem is they may never grow a half inch beard until after they escape, just using that for one example, or they may come in with a beard, and if we're not allowed to require them to shave, they may immediately shave it after they escaped, or got in some area they're not supposed to be in, to alter their appearance.

Q Have you -- has there been a whole lot of escapes from the Department of Correction because people were wearing beards?

A Not as of recent years, thank goodness. I do recall one back in the 70s or 80s where the individual grew a beard and blended in with homeless people in Houston, Texas, and I think

two or three years before they captured him, and that was to alter his appearance. Of course, that went the other way around, I think he left the ADC clean shaven and grew the beard after he got out, and he was eventually apprehended, but.

Q So if -- somebody could escape from Cummins then and get out and alter their appearance by growing a beard, right?

A Oh, certainly, if we don't apprehend them before they have time to do that.

Q Okay.

A But if you escape with a beard, and you shave it, then you have immediate means of altering your appearance, like right now.

Q So if -- if other -- other, again, I refer back to other institutions or other prison systems that allow this to happen, allow people to grow beards, and they're not seeming to have a problem with escapes, what would, again, the -- you have -- you still would have a problem with people wearing a half inch beard in the Department of Correction?

A Yes.

Q Regardless of other prison administrations doing the same thing and allowing it?

A I can't testify to the fact that they aren't having problems because of that, because I don't know what goes on nationally across the country. Again, I would like to talk to

some of those administrators and see what kind of problems that they have experienced because they for whatever reason have chosen to go that route. But, yes, that would concern me greatly.

Q How long -- how long -- I know what the policy is regarding the head hair in the ADC. As far as the length on the top of the head hair, is there a specific length they can grow it to as long as it doesn't extend past the earlobe and the nape of the neck?

A There is. I believe that's outlined in the policy. I don't remember exactly what it is. I just know that it has to be off the collar and above the ears.

Q So if somebody has hair on top of their head, they could -- they -- you know, that they could hide something in there, right?

A Well, you could hide something in hair the length of yours or mine, but that's not excessive according to the policy.

Q So if it could be -- my question then is, if that's the case, then why is the facial hair a target and the head hair is not?

A The facial hair just gives another avenue, just adds another place to hide contraband.

Q Okay. But you admit you could hide contraband pretty much anywhere though, right?

A They do hide it in a lot of different places, yes. I'm

sure you're familiar with that.

Q Okay. Let me see here. Would a half inch beard -- would a half inch beard, for officers being able to identify the length of it, would it be fair to say that you can tell when a beard is getting past a half inch?

A Well, I believe that would change from individual to individual. What you might think just at a glance is a half inch, I may not think is a half inch, or the next person may not think is a half inch. Anyway, how are you going to gauge that?

Q So you wouldn't -- so you're telling me that you couldn't -- your officers wouldn't be able to look at somebody and be able to tell whether their beard is a half inch or longer and be able to tell them you need to go trim that down because it's getting past regulation?

A You could give an -- you could give an approximate look at someone's appearance and say maybe that person is out of compliance, maybe they're beyond the half inch, but then that person is in disagreement, says, well, I'm a half inch or less, and they file a grievance, and then you go through all those steps to handle that. I mean, do you actually call the person in and measure the beard or, you know, how are you going to deal with that on a regular basis?

Q Okay. As far as the Koran that you said was sent in by the individual, in fact that individual was an attorney,

wasn't it?

A That's correct.

Q Okay

A Our policy mandates that it come from a bookstore or a supplier, not from an attorney, an individual.

Q Okay. And you also stated that the first time you heard about the order was when Major Robertson or somebody had called you and told you that I had this court order; is that right?

A Yes, I don't remember if it was Major Robertson or Mr. Warner, but one of the two.

Q And you don't remember -- you don't remember admonishing Major Robertson and telling him that the order -- that if it was a valid order, he needed to -- he needed to let me out immediately, do you remember saying that?

A Well, that's a possibility. I do remember telling the major that that would be highly unusual for an inmate to have an injunction of some sort that we didn't have a copy of or hadn't been informed of through the courts or through legal counsel or somehow.

THE PLAINTIFF: Okay. I think that's all I have.

THE COURT: Thank you, sir.

Do you have any follow up questions of the warden?

MS. CRYER: I don't think I do, Your Honor

THE COURT: I have a couple. Can you tell me, how do

you manage the folks that have the medical script quarter inch beard?

THE WITNESS: We stop them in the hallway, Your Honor, and ask them to present a script if they're not in compliance with the grooming policy, and if it appears to be outside the quarter inch -- a quarter inch is pretty much close to what you get using a clipper without a guard, if you just -- I don't know -- if you just try to shave with a clipper, for example, rather than a razor, that's pretty much what you get. They're pretty close.

THE COURT: Do you know about what percentage of the population has that?

THE WITNESS: No, sir, it's not a very high percentage, you don't run into it with every other inmate, you know, when you're in the hallway, but you do see it.

THE COURT: And with regard to the hair length, Ms. Cryer, do you know -- does somebody know, can somebody speak, is there actually a -- I know you said you didn't have -- you thought it was in the policy, but you didn't know for sure, I'd like to know what the policy actually is, is there a length per se or is just to the collar, like you said, I mean?

MS. CRYER: If you will give me just a minute, I'll look for the policy, because I think I brought a copy.

THE COURT: Okay. And you don't have to look that up right now, I mean, I -- if somebody could speak to that, I'd like to know what the actual policy is, because my next question then is, have you actually had people hiding contraband in their hair?

THE WITNESS: I can recall one coming into segregation back when I was a uniformed officer with a marijuana joint in his hair, yes, sir

THE COURT: Okay. But anything recent?

THE WITNESS: Not recently, no, sir.

THE COURT: All right. And then that also brought me to another question is you've obviously been a warden for 14 -- 13 years or going on 14?

THE WITNESS: Yes, sir

THE COURT: And how long have you been in the prison business?

THE WITNESS: 36 years and some odd months.

THE COURT: And you started out as a CO?

THE WITNESS: Yes, sir, at Cummins.

THE COURT: At Cummins. Last question, the Ninth Circuit case, it appears that they have a grooming policy and then the Ninth Circuit allowed this beard, half inch beard, have you had any sort of correspondence, any training, or anything based on that, that the California officials have mentioned anything or come and spoken at any conference or

anything, have they talked about what the impact has been in their prison system?

THE WITNESS: No, sir, I haven't had an opportunity to visit with anyone about that. As a matter of fact, I wasn't aware of that case until this came up.

THE COURT: Got you. Okay. Thank you.

MS. CRYER: Your Honor, I think I have just one question.

REDIRECT EXAMINATION

BY MS. CRYER:

Q Mr. Lay, are you responsible for creating the ADC policies with regard to grooming?

A No, ma'am. That would come from the Board of Corrections.

THE COURT: Any follow up?

THE PLAINTIFF: I have one.

THE COURT: Yes, sir

RECROSS EXAMINATION

BY MR. HOLT A.K.A. MR. MUHAMMAD:

Q But you are responsible for enforcing it, correct?

A That's correct.

THE PLAINTIFF: Okay.

THE COURT: Warden, you may stand down. Thank you, sir.

THE WITNESS: Yes, sir.

(Witness stands down.)

THE COURT: Your next witness?

MS. CRYER: Thank you, Your Honor I know I'm going to have one more. That's going to be Grant Harris.

THE COURT: All right.

GRANT HARRIS, DEFENDANTS' WITNESS, SWORN.

DIRECT EXAMINATION

BY MS. CRYER:

Q Mr. Harris, would you state your full name for the record, please?

A My name is Grant Edward Harris.

Q And, Mr. Harris, where are you currently employed?

A I'm currently employed with the Arkansas Department of Correction. I am an Assistant Director of Institutions.

Q And prior to being the Assistant Director of Institutions, what was your position with the Department of Correction?

A I was the warden of the Varner Unit, which encompassed the ad seg Supermax, for a little over six years.

Q Prior to being the assistant director, how long in total were you a warden for the Department of Correction?

A Approximately 18 years.

Q And when did you first begin working at the department?

A I began my career at Tucker Unit in 1979, and at that point there were only three facilities within the state of Arkansas.

Q Okay. Mr. Harris, you've been present in the courtroom

for the testimony of both inmate Muhammad, as well as Warden Lay; is that correct?

A Yes, ma'am, that is correct.

Q Okay. And did you hear Warden Lay's comments or concerns with regard to contraband?

A I did.

Q Okay. Let me just ask this, and we can kind of circumvent some of my questions, was there anything with regard to Warden Lay's testimony that you disagreed with?

A No, ma'am, there's nothing that I would disagree with. In fact, I would like to really amplify on one point, if I may.

Q Sure.

A If it please the Court? You know, certainly weapons are a concern when it comes to facial hair, but I think one thing that we really need to touch on this morning is what we've been experiencing as an agency within the last few years, and that's the introduction of cell phones which are coming into our institutions. Last year alone, we probably confiscated in excess of a thousand cell phones at all institutions. What's unique about a contraband cell phone is that our phone system records conversations and this is how we gain intelligence, with the exception of legal or attorney calls, those calls are not recorded. So we use the recorded calls as a means of gaining intelligence to see who is trying to smuggle in what within the different institutions or who is dropping something

off

When I was the warden at Supermax, I guess what was amazing to me is just as we had closed one avenue of receiving contraband and weapons and drugs within the institution, another one would open up. The cell phone was the means of making that avenue happen. I remember one particular situation, we never identified the visitor, but due to the shape of the package, the visitor would go into the restroom, it was in a body cavity, would actually flush the marijuana, the rock cocaine, black tar heroin, down the commode, it was tightly wrapped in cellophane and duct tape. The trusty, who was outside the fence, who was working the sewer pond, who was, you know scraping, getting evetything up, was actually fishing that out, he was carrying it back to maintenance, he was breaking it down, he was bringing it in the back door of our kitchen. And believe it or not, the inmates in the main kitchen were working it, again repackaged, in the food, taking it down the hall to Supermax to ad seg. What was amazing about this is they may not necessarily try to move a whole cell phone or a large amount at one time, they moved maybe it was something that was just a piece of that object, and actually put it together. So when you get to the dining facility in the Supermax, you've got another group of inmates that are on the serving line, and they know maybe that Sergeant Stanley, who works Cell Block 6 all the time, starts

out on Tier 3, and he feeds from left to right. Well, he's actually counting the number of cells and counting the number of trays, and he's concealing that contraband or that weapon in that particular tray to get to that inmate. And from there, it can exchange hands. I just took the liberty of bringing one small thing that you may not consider to be a weapon, but certainly it is given the gravity of what can be introduced into the institutions. It's something as small as a SIMS card. And this is it. And certainly, this can be concealed just about anywhere, as well as a beard. And this is what makes the whole thing magic, this is what makes it work. And I have seen phones altered in so many different ways without battery packs, where they've taken AA batteries and wrapped them up to charge and work the phone, pieces of phones that have been walked down the hall in flip flops that have been put together later on in an ad seg, in general population. It's amazing how creative you could get. Something this simple can be responsible for the introduction of drugs or weapons into any institution. And I just felt like I needed to miss -- miss that point, because at this point I don't know that we've really addressed that.

Q Okay. Let me -- let's get back to the concern that -- or the request that inmate Muhammad has, and that's the request to have a one half inch beard.

A Sure.

Q Do you have any concerns now as a former warden, current assistant director of the Department of Correction, that something such as the SIMS card that you brought with you today could be confiscated -- or could be hidden in a beard?
A That could be the piece of the phone that makes it all work. Certainly. As well as the needle off of a syringe and the diabetic inmate that's in ad seg that acts like he's putting the cartridge or the base of the syringe in the sharps container, pulls it back out, that maybe the syringe got broke off before it was placed in the sharps container, well, he passes that to the guy that's got the needle in the next cell. I mean -- I mean, the possibilities are flammable, really.
Q And again, there has been testimony today with regard to all the various different places that you -- that an inmate can hide or conceal contraband. Do you disagree with any of the testimony today with regard to the different various places that inmates can conceal contraband?
A No, ma'am.
Q Does that alleviate your concern with regard to an inmate who is requesting to grow a half inch beard?
A I'm very concerned about a half inch beard.
Q Okay. Are you responsible for preparing or for changing any of the Arkansas Department of Correction policies?
A I'm a member of the policy committee itself. There's a number of members, including our lead staff attorney, who is

actually the chair of the committee, so I do have direct input into the policy and change, yes, ma'am.

Q Okay. The Court inquired earlier with regard to the department's policy on grooming. Did you actually bring a copy of the grooming policy with you?

A I did. I have that in front of me.

Q Okay. What is the policy number?

A The actual policy is a -- it's an Administrative Directive, and the number is 98-04, and it deals with the reference to the Administrative Regulation of personal cleanliness and grooming for inmates.

Q And in looking at the policy, would you please refer to the part that makes reference to the length of hair that an inmate may have?

A It's probably the closest thing to that, it states:

> "Inmate's hair must be worn loose, clean, and neatly combed, no extreme styles are permitted, including but not limited to corn rows, braids, dread locks, mohawks, et cetera. The hair of a male inmate must be cut so as to be above the ear, with sideburns no lower than the middle of the earlobe, and no longer in the back

than the middle of the nape of the neck."

It also talks about the aspect of the medical script for a dermatological problem as well.

Q I asked Warden Lay earlier if he had any concerns, not even just with regard to inmate Muhammad, but any inmate that is allowed to do something that other inmates are not allowed to do.

A That's the last thing that you would want to happen in an institution. As Warden Lay pointed out earlier, you know, certainly it can make them a target with some of the inmates in the population, but it could also try to -- it could also elevate his status and make him even possibly even more sought after by other inmates who are looking for a leader and who want to follow.

Q Does that cause any concerns to you as a member of the security staff or security team with the department?

A Certainly, it does. If you're in the business of recruiting or anything like that, it all -- that all has a bearing on that.

Q And again, I know that Warden Lay was able to testify with regard to his concerns at the Cummins Unit where he is currently the warden. Do you have any concerns department-wide with regard to whether or not an inmate or possibly other inmates were allowed to wear the half inch beard?

A I have that concern for us as an entire department, at every institution.

Q Are you aware of what other states are doing, how they run their facilities, or what types of rules that they have?

A No, ma'am, not specifically. I'm really not.

MS. CRYER: Your Honor, I think that's all the questions that I have of Mr Harris.

THE COURT: Do you want to make the grooming policy a part of the record?

MS. CRYER: I would, Your Honor

THE COURT: All right. Any objection? I don't know that it would be a viable objection, but you can make an objection for the record.

THE PLAINTIFF: No objection.

THE COURT: Okay. Why don't we make that -- if you need that back, we can make a copy and give that --

THE WITNESS: That's fine, Your Honor.

THE COURT: Okay.

MS. CRYER: And if I'm not mistaken, Your Honor, I believe Mr Muhammad may have attached a copy of the policy, the 98-04, to one of his pleadings. I'm not positive that he has, but for some reason I was thinking that he had previously.

THE COURT: Okay. Well, I'll make it a part of the record here, we'll call it Defense Exhibit 1

MS. CRYER: Thank you, Your Honor

(Defense Exhibit No. 1 identified and received.)

THE COURT: Do you have questions of the director here?

THE PLAINTIFF: Just a few.

CROSS EXAMINATION

BY MR. HOLT A.K.A. MR. MUHAMMAD:

Q I just have a few questions for you.

A Sure.

Q You made the statement about the -- the AD 98-04, correct, regarding the policy for the head hair?

A Yes, I did.

Q In that policy, it doesn't state any type -- any particular length on the head, does it?

A No, it does not.

Q Okay. And also, in this case, this particular case we're talking about now, have you been made aware of any -- any attempts at targeting me, because I was walking around in the halls at Cummins Unit with a beard, by other inmates?

A No, I have not.

Q And you haven't been made aware of any other -- of any information come to your attention about anybody trying to seek me out as a leader because I had a half inch beard on my face, or have you been made aware of anything like that?

A No, I have not.

Q Okay. Again, you brought out the thing about the SIMS -- the SIM card, I believe. It's -- again, there's more ways to move contraband in a prison, I reiterate in a prison, than just the facial hair, correct?

A Yes, that's correct.

Q And you are also aware that in any given institution, that there are officers that will move contraband for inmates and routinely do so?

A I don't know about routinely, but we have dirty staff as well as dirty inmates.

Q So if an inmate wanted contraband or weapons moved, instead of putting it in facial hair, they could give it to a CO that they paid some money to, or they'd have a homeboy on the street that they could use that to get it -- to move it around and get it within the institution, correct?

A That would be a possibility.

Q And, in fact, officers do that, right?

A There are some staff.

Q Okay. I believe -- let's see here.

THE PLAINTIFF: Can I have just a minute, Your Honor?

THE COURT: You may.

BY MR. HOLT A.K.A. MR. MUHAMMAD:

Q Now, as far as the issue of inmates wearing beards in the Department of Corrections, would it be, again, I ask you, fair to say that not every inmate in the Department of Correction

is going to grow a beard -- is going to grow a beard?
A I really don't know. I don't think I can answer that.
Q Or whether they can or not, you don't -- you don't have an answer one way or the other?
A I really don't.
Q Okay. As far as prisoner identification goes with respect to -- because I know that's an issue -- again, you all have ID cards that are issued to inmates to readily identify them by staff, correct?
A That's correct.
Q Okay. So if a -- if someone, let's say, for example, should the grooming policy be changed to allow a half inch beard, would -- would it be a problem to require inmates coming into the Department of Correction to be clean shaven with their first photo taken, and after a half inch beard has grown, retake another photo for comparison purposes?
A Well, I think Warden Lay answered that when you asked him that same question earlier. But again, what you have to consider is the aspect of that beard being used to conceal weapon -- weapons or contraband, to have that contraband introduced into a facility.
Q Now you've mentioned about a quarter inch beard, some stuff has been made about that, about the quarter inch beard. Is it not a fact that some people grow a quarter inch beard thicker than others do?

A You know, again, I -- I'm not really sure how to respond to that. Everybody -- everybody's facial hair is different in that regard.

Q But the ADC specifically has a policy governing a quarter inch beard for dermatological or skin condition, correct?

A Yes, that's correct.

Q So I ask you, sir, how then is a quarter inch beard for dermatological reasons not a security threat given -- again, given that it's been stated that people can grow different -- a half inch beard can be one way on one person, different on another, where a quarter inch beard would be the same way, explain to me how that is not a security threat, but a half inch beard is?

A A half inch is longer than a quarter inch.

Q But again, the question is how is one if -- if the Court -- if your policy is to stop the moving of contraband and weapons in the facility, and your main objection is that the facial hair is the conduit to do so, to move it around the facility or whatever, then explain to me how a quarter inch beard is going to be any different than a half inch beard.

A The last time I probably walked one of my institutions was before the holidays. The quarter inch beards, you know, primarily, you can still see the skin.

Q And you're saying a half inch beard, you wouldn't be able to do that?

A I don't think so, no.
Q But again, a quarter inch beard, again people can grow at different lengths, right?
A Sure, everybody's hair is different.
Q And a quarter inch beard can have -- one person can have a quarter inch beard that's thick, the next person can be one that sees the skin; would that be an accurate statement?
A I didn't hear the last part. I'm sorry.
Q I said a quarter inch beard, someone growing -- one person growing a quarter inch beard might grow it thicker than somebody else, where you can see the skin on him, but you can't see it on the other person. Would that --
A I suppose that's possible, sure.
Q So they could hide contraband in that, too, right?
A That's a possibility. But again, the quarter inch is -- beards that I've seen, the skin is showing.

THE PLAINTIFF: Okay. That's all I have.

THE COURT: Redirect?

MS. CRYER: I think I just have one.

REDIRECT EXAMINATION

BY MS. CRYER:

Q So, Mr. Harris, if you have inmates throughout the department that are allowed to grow one half inch beards, and presumably some can grow thicker beards than the other, how -- how, as part of the department, do you monitor the thickness

or what could possibly be in some of the beards, but not in other beards?

A That's almost an impossible task, you know, when you're dealing with that large of a population. And again, it's just another avenue for contraband and weapons.

Q Is it your --

A I don't -- I don't know how you would do that.

Q Okay. Is it your testimony today that inmates who could possibly grow half inch beards, that's the only way that they would be able to carry or pass contraband to one another?

A Through the half inch beard?

Q Yes.

A There's many ways, ma'am.

Q Okay The half inch beard is not just the only one?

A No, ma'am, it is not, not by a long shot.

MS. CRYER: Okay That's all I have, Your Honor.

THE COURT: Mr Harris, you heard the questions I asked of the warden. Do you remember those?

THE WITNESS: I do. Probably the last one, if I could go in that order, Your Honor, I haven't heard anything, any consequences or -- or feedback on since what happened in California, and I'm trying to recall anything negative or positive about their grooming change, but I don't know that I can recall the first question, Your Honor.

THE COURT: Well, and you've answered it with the

policy here. You know, the other line of question was kind of were you aware of any -- in your experience, aware of any contraband being hidden in hair?

THE WITNESS: Oh, yes, sir

THE COURT: You are?

THE WITNESS: Yes, sir

THE COURT: Okay. Anything recent?

THE WITNESS: No, sir, not recent, not in the two years since I've made the transition to assistant director.

THE COURT: All right. And how long have you been in the prison business?

THE WITNESS: 32 years last November

THE COURT: And did you also start out in the CO -- as a CO or --

THE WITNESS: Yes, sir, I actually worked my way up through the ladder Corrections is my life. It's the only job I've ever held.

THE COURT: I asked my lawyer to get me a ruler. You held the SIM card up, and I thought for record purposes --

THE WITNESS: Oh, sure.

THE COURT: -- can I see it and --

THE WITNESS: You can.

THE COURT: -- let me get some dimensions on the SIM card.

THE WITNESS: Yes, sir.

THE COURT: It looks like it's an AT&T SIM card here. And it is -- it looks like it's 3/8ths inch long ways and just under 3/8ths of an inch width ways, so it's a pretty small device. I don't know if anybody has any questions that the SIM card I hold up, do you -- I mean, those are the measurements I made. I think they're pretty accurate. It would be 7/16ths width -- I'm sorry, that can't be right. That would be 9/32nds.

MS. CRYER: Your Honor, I don't know if it would be helpful to make a copy, to place the SIM card on a photocopier and make a copy of it --

THE COURT: We can do that if you would like to.

MS. CRYER: -- for the record. I think I would, if that would be acceptable.

THE COURT: Okay. Sure. It's 9/32nds width. Looks like 13/32nds length. But we'll do that at a break, if you don't mind for us to borrow this?

THE WITNESS: No, sir

THE COURT: We'll photocopy it on the -- with the ruler.

MS. CRYER: Thank you.

THE COURT: All right. Any other follow up?

MS. CRYER: I do.

THE COURT: You may. Feel free to.

MS. CRYER: I have actually just a couple. And I

apologize, Your Honor, because I know I said that I did not --

THE COURT: It's not a problem at all.

MS. CRYER: -- have any additional ones for him.

FURTHER REDIRECT EXAMINATION

BY MS. CRYER:

Q Mr. Harris, let me ask, do you have any concern with regard to the safety of the officers who might be required to check what's inside an inmate's beard?

A Well, certainly, you do. I mean, from the standpoint of syringe needles, the safety razors that are issued, you know, they break up -- some break up better than others, even a small -- the smallest piece of a razor and getting -- getting a wound from that, getting a cut, those are all concerns.

Q And again, do you have the same concern with regard to the safety of officers if they are checking for contraband inside an inmate's hair?

A Certainly, I do.

Q Does the concern amplify or increase if the officer now has multiple places on the head that they are to search, not just one?

A Yes, that's a concern, certainly.

MS. CRYER: Okay. Your Honor, that's all I have.

THE COURT: Any follow up?

THE PLAINTIFF: Yes, I do. I've got a couple.

RECROSS EXAMINATION

BY MR. HOLT A.K.A. MR. MUHAMMAD:

Q You allow inmates in the Department of Correction to grow a mustache, right?

A Yes, that's correct, as long as it doesn't drop below the corners of the mouth, as it's outlined in the policy.

Q Is it not a fact that some people grow thicker mustaches than others?

A Probably so, yes.

Q Could you not hide that SIM card right there in a mustache just as easily as you could a beard?

A It's possible, sure.

Q So, and then, let me ask you about this here, the -- about officers reaching in the beard of being exposed to sharp objects or things of that nature, you're worried about security issues regarding that, correct?

A I'm worried about the safety of the staff as well as the inmate population.

Q But an inmate -- an inmate in population could actually -- would be -- could actually conceal weapons on their person, be more of a threat than somebody having something in their beard, wouldn't you say?

A No.

Q Be more likely to conceal on their person instead of their facial hair, right?

A Not necessarily, no.

Q You don't believe that?
A No.
Q So other institutions that do this, that these officers are doing this at other institutions, especially the one in California, these officers are actually doing that, what do you say to that?
A I'd say I've never been impressed with the California system.
Q But if they're able to do it, then you -- the Department of Correction could do it just as easily, right?
A No, I wouldn't agree with that. You know, again, from the standpoint -- and I want to make sure that I key in on this -- is that you're talking about the safety and the security of the institution, and what our primary mission is, and what we're trying to prevent from coming into our institutions, and that's weapons, that's guns, that's meth, that's crack, and it goes on and on.
Q But a lot of that stuff is brought in via your officers, aren't they, sir?
A And so much of that is also brought in by inmate visitors.
Q That's correct, too, I would agree with you on that. But there's many different ways for it to come in, other than just put it in the facial hair?
A Yes, we've addressed that question already.
Q And the -- really, the issue about the facial hair is not

really about security, is it?

A Certainly, it's about security

Q So would you have your -- the officers at these institutions that are -- that are harassing inmates going down the hallway for some stubble on their face, the stubble does not represent a security threat, does it, sir?

A I don't know about your allegation of harassment.

THE PLAINTIFF: Okay. That's all I have.

THE COURT: Anything further?

MS. CRYER: No, Your Honor.

THE COURT: You may stand down, sir Thank you.

THE WITNESS: Thank you.

(Witness stands down.)

THE COURT: Do you have anything further, Ms. Cryer?

MS. CRYER: Your Honor, I don't believe so. I have several witnesses that would be here that could testify with regard to the Islamic religion and what is required and not required, and I really don't think that that is a central focus of the hearing today. And I do have Deputy Warden Weekly that is here. She is in security, although she was really brought here just with regard to a disciplinary that inmate Holt was issued and was complaining about or had raised in one of his motions. But because he really hasn't gone into that today, I don't think there's really any need to put her on the stand. And I think her security concerns would just

overlap what Mr Lay and Mr Harris's concerns have been.

So, a long way to say, no, sir, I don't believe I have any other witnesses.

THE COURT: All right. Thank you, ma'am.

Do you have anything further, Mr. Muhammad, that you wanted to present?

THE PLAINTIFF: No, sir.

THE COURT: What I'd like to do is I'd like to take a brief recess and put my thoughts together And, you know, I'll have a written ruling, but I'd like to make a preliminary finding, just that's how I try to do my business, I try to let people know when they walk out of the courtroom kind of what I'm thinking, so later I don't issue a written ruling and pull the rug out from under you.

Ms. Cryer?

MS. CRYER: I was just going to ask for permission, Your Honor, to make a brief closing argument, if I may?

THE COURT: You may. You may. And so may you, Mr. Muhammad.

MS. CRYER: Do you want to let Mr. --

THE COURT: Well, you know, it's kind of your burden, Ms. Cryer, I think, so if you want to go first. Well, there again, yeah, it makes no difference, but I'll let you all speak, and if at the end of each turn if there is something burning on your mind, I'll let you have a rebuttal. How about

that?

MS. CRYER: Okay. Thank you, Your Honor I will be brief

Your Honor, the current grooming policy of the Arkansas Department of Correction is Administrative Directive 98-04. It is the same policy that was valid and in place in the *Michael Fegans* case that was decided by Judge Moody back in 2006 and affirmed by the Eighth Circuit in 2008. There is not anything that has changed since the findings in *Fegans*. The grooming policy has not been found to be unconstitutional. If I'm not mistaken, I don't even believe that Mr Holt is arguing that the policy itself is unconstitutional. He just says that there should be an exception made to him because he wants to be able to grow a half inch beard.

I find that Mr. Holt or Mr. Muhammad's testimony is in a way contradictory in and of itself. In his pleading, he indicates that it is his religious belief that he not be required to trim his beard at all. And yet based upon a 2004 Ninth Circuit decision, Mr. Holt therefore says, well, I'm willing then to consider it and to compromise.

Well, if his position is that he shouldn't have to cut it, then that should be his position, he doesn't have to cut it. What he's doing is saying that I'm agreeing to cut it half an inch, that the -- that the entity that he prays to will see that he has tried to follow the laws, has done the

best that he can, and even if he was being restricted from doing so, it's still going to be okay.

The defendants' position would be that the same applies for even if he is required to comply with the Department of Correction's grooming policy and to completely shave his beard.

And the law that he cites to is a 2004 decision. The counsel for inmate *Fegans* in 2006 argued Ninth Circuit, as well. And while their religious beliefs were different, Michael Fegans was a follower of the House of Yahweh, Mr Holt is a follower of the Islamic faith, essentially, Your Honor, not to compare the two religions, but essentially it's the same argument, take the religious nature out of the name of what you're going to call the religion and it's the same religion, it's the same argument. Nothing has happened between the 2006 decision in *Fegans* continuing forward to 2012 today.

The testimony that was offered by both Mr Lay and Mr. Harris was that the carrying of contraband and the issue and concerns of contraband has increased from 2006 forward through today. So it's not a matter of the department is not concerned or no longer concerned about -- about the security and the contraband, they simply see the -- making the allowance for a half inch beard is yet one more avenue in which an inmate, whether it's Mr Holt or whether any other

inmate in the Department of Correction, could possibly carry in contraband.

They seemed -- or they -- it appears that Mr. Holt has offered to say or is implying that he won't try to hide contraband in his beard. And unfortunately, an inmate making that statement, who is serving a life sentence, who really doesn't -- plus 40 years, who really doesn't have anything to lose, Your Honor, just isn't good enough. If the administration could take the word of every inmate, again, no particular disrespect to Mr. Holt, but that just can't happen. And the question becomes where do you stop? There has been an increase in the introduction of various other forms of contraband, and clearly, the department's concern is valid based upon those security reasons.

The testimony, Your Honor, has also been that inmate Holt has a number of other options and avenues and ways of exercising his religious beliefs. He's able to pray. He's able to possess a Koran. He's able to get a spiritual advisor. He's able to have a religious diet. He's able to acknowledge all of the religious holidays that he wants to. He's able to have a prayer rug. He could do all of these different things in practice of his religion. But to say that by not being allowed to have a half inch beard or else he can't -- he can't practice his religion, falls flat on the other arguments that he's made, Your Honor.

And I would respectfully say that the grooming policy has not been found unconstitutional. The *Fegans* case has not been overturned. We follow Eighth Circuit law. We are in the Eighth Circuit.

While Mr Holt may try to bring in Ninth Circuit case law, essentially, Your Honor, been there, done that, nothing has changed. And, if anything, the evidence presented shows that there is more security concern in 2012 than there was in 2006. So we respectfully ask that the order that is currently in place with regard to the temporary restraining order be removed or lifted and that Mr. Holt be required to comply with the grooming policy.

Thank you.

THE COURT: Thank you, ma'am.

Mr Muhammad?

THE PLAINTIFF: The issue here is about whether or not the Department of Correction's policy is the least restrictive means of allowing me to practice my religious beliefs.

While the Ninth Circuit -- while the defendants here may knock the idea of bringing in Ninth Circuit law, it's still considered persuasive law in this case. The facts are the same. The policies are the same. The institutions there instituted these changes. Whether they've had problems or not, the defendants haven't been able to say one way or the

other.

We've heard that you can get contraband in the facility in any number of ways. In fact, they stated that from 2006 to 2012, that the increase in contra -- they feel contraband has increased. Well, I would submit to Your Honor during 2006 to 2012, you were required to shave your beards. So that -- that would -- that falls.

And then the fact that if -- if they're worrying about the grooming policy causing the flow of contraband into the prison, then what -- what has been the issue for the past six years when there was a grooming policy that said you had to shave your beards?

In the *Mayweathers* case, and in others in the Ninth Circuit, as well as in New York, the same argument was made that the defendants have made here today In each of those cases, the courts have ruled that that's not enough, that having a concern about a beard altering identity, hiding weapons, things of that nature, the courts have rejected it. It's even been appealed to the U.S. Supreme Court. The U.S. Supreme Court rejected review. And I believe that you, Your Honor, should take that seriously into consideration. And it's a recent case. It might be seven -- six, seven years old, but it's still a persuasive law case.

On top of everything else, again, I reiterate *Michael Fegans* argued unrestricted hair growth, unrestricted beard

growth. I am not arguing that -- that having unrestricted hair, unrestricted beard does not present a security threat, because it does. What I am arguing is, is that a half inch beard -- we can get all day into about SIM cards being hid, but we heard -- we heard Mr Harris say that you could hide one in a mustache. And there is people walking around there you see with thick mustaches that you could hide stuff in.

The bottom line is that should you allow this injunction to continue it would not affect the other inmates in the Department of Correction. It only affects me at this point, just like it has been. It's been established that even if other inmates were allowed to grow beards, they couldn't state with a degree of certainty whether or not that people would grow beards or not. Some people can't grow beards. I'm sure you're aware of this. Some people physically can't grow beards. Some don't want to because of -- because it itches their face and things of this nature. So they're not going to have to worry about 15 to 16 thousand inmates walking around with beards on their faces.

The issue here is whether this is a least restrictive means to practice my religion.

Regardless of whether I have a Koran, regardless of whether I have Sujud, the prayer rug, whether I have access to religious advisers, which is very rare at Cummins Unit, it still doesn't answer the question of whether or not imposing

the punitive sanctions on somebody at the risk of forcing somebody

In the *Warsoldier v. Woodford* case, the court there rules that these type of restrictions, these type of punitive sanctions cause somebody to have to -- to choose between following what the state says they should do and following what the dictation of their religions say they should do and having to decide what they're going to do in that situation.

In fact, it was even argued in the *Mayweathers* case that it's either a issue of following Allah and the Sunnah or following what the state says. And the Ninth Circuit found, and so did the U.S. Supreme Court when they denied review, they found that -- that this issue here, that having all of that was still was burdensome, that having -- that forcing Muslims to shave their beards or whatever is -- was burdensome on the practice of their religion. And the state has not -- the state has not -- has not held with that, has not answered it.

Whether or not people bring -- bringing in weapons, contraband, or whatever, they're going to do that. They're going to do that. And I submit to you that a half inch beard is not going to cause any significant increase in the flow of weapons, or what have you, into the facility. It's been established that corrections officers bring it in, it's brought in through visitation. And at this point in time, at

visitation, you have to shave. So they're not transporting it in a beard to get it out of the visitation room, they're transporting it in there clothes or secreting it on their person in a body cavity somewhere. So I believe that argument shouldn't hold water either, because if you're going to hide a weapon on you, the facial hair, if it's long, maybe, but again, a half inch beard, I mean, come on, Your Honor, I mean, it's -- it's preposterous, you know, to say that you have to -- you have to cut this, but this up here, well, we don't really have a policy about that, about the length of it, it just has to be loose and neatly combed. You understand what I'm saying?

So I'm asking you take all this into consideration and look at it for what it really is, for what this policy really is about. And I would ask you to continue the injunction as it applies to me, as it applies to me at this point, allow me to continue to grow a half inch beard. And whether I'm an inmate or not, I'm still a man, I'm still a Muslim, and these people have not shown that I've been deceptive in any way, and when I give my word as a Muslim, I fear Allah that much to tell you that I'm not going to do stuff like this. I may have a life sentence, but I do have something to lose. I do have something to lose because all of my appeals, Your Honor, haven't run out yet. I could still face freedom. You understand what I'm saying? And I'm not

trying to jeopardize that with some -- with some foolishness such as this. I'm doing this for my religious beliefs.

And the fact is nobody disputes that they're sincere. That's something else you must weigh, the sincerity of that belief. And I've given you -- I've given you Sunnah, I've given you Hadith, there is no question that a Muslim is to trim the mustaches short and leave the beard as it is.

Now, Ms. Cryer over here made reference to the fact, well, I said that I would -- that I believe that the beard should remain uncut. As I pointed out to you once before when I was on the stand, the Hadith says that if you intend to do a good deed and you don't do it, it's still credit to you as a good deed. The fact of the matter is, is that I have made an effort to comply with certain tenets of the religion as it relates to the beard, and to do so, and to do that, I've been willing to compromise. I've been willing to compromise as far as the length goes. You understand what I'm saying? But I'm still following the Sunnah of the Prophet Muhammad, sallallahu alayhi wa sallam, and it stands uncontroverted because the defendants have not chosen to answer it.

And I ask that you allow the injunction to remain in place.

THE COURT: Thank you, sir.

Rebuttal?

MS. CRYER: I do, Your Honor I'm going to start

with the last one. Inmate Holt says that he has stated for us, and that it is cited throughout his religion, that if you intend to do a good deed, but that you're not able to, that it's okay. That's exactly the argument that we have made today, Your Honor

Mr. Holt says that he intends to do the good deed by trying to let his beard grow. The Department of Correction says no, he should not be allowed to do it. According to his own reasoning that he just got finished explaining to this Court, that should be okay, according to his religion and according to everything that he's stated today, according to him, that should be okay.

Mr. Holt said that the growing the half inch beard only applies to him and if the Court is allow -- to allow the temporary restraining order to continue with the order, that it would only apply to him. I refer the Court to docket entry number 44, which was filed on November 17th, 2011 by inmate Holt, in which it is his second motion for leave to amend, in which he is seeking to add a number of other inmates into -- into the case. So, clearly, he's not seeking for this order or for anything in this case to simply involve just him.

He makes reference, Your Honor, and argues the *Mayweathers* case out of the Ninth Circuit. Your Honor, in looking at page six of 11 of that case, it states that:

"Defendants assert that the

grooming regulations are necessary to identify inmates for the purpose of preventing escapes and controlling movement within the prison. Defendants also submit that the beard of any length changes the appearance of a prisoner and compromises the process of identifying inmates or escapes and that officers need to quickly identify inmates to prevent assaults, riots, or disturbances."

I don't believe, Your Honor, that the *Mayweathers* case addressed anything with regard to contraband and the possible carrying and continuing on of contraband being passed from one inmate to another, from it being passed down the hall, as well as the security concerns, even the health concerns with regard to the officers who may have to check it. There is absolutely no dispute that unfortunately contraband does exist within any prison setting.

I do think that it's reasonable for the defendants to at some point have to say -- or for the department to say at some point we have to stop here, we have to limit what can be done. Inmate Holt wants a half inch beard. What's next?

Another inmate comes in and says I need a one inch beard. Another one comes in and says that I need a half and a -- a one and a half inch beard.

And, Your Honor, I know that inmate Holt has made reference to a violation of the policy and that he could catch a disciplinary for not complying with the policy. That's correct, Your Honor, he can, but that's also true for any rule violation within the Department of Correction. It is not simply restricted to the grooming policy.

And lastly, inmate Holt made reference, too, that he is not deceptive, that he has not tried to deceive anyone. Well, Your Honor, he may not as of this point -- in his one and a half years within the department, he may not have tried to or have deceived anyone that we're aware of. However, Mr. Holt's own behavior with regard to just recently the behavior that he exhibited towards the inmate barber who cut the hair, according to him, too short, which inmate Holt said that they were then at war, and yet he said that can be interpreted in many different ways, I'm not sure how else to determine or decipher the phrase "at war." So while he may not be deceptive, he clearly is showing tendencies, for a better phrase, not being able to get along with others. That does create security concerns throughout the department and it will continue to create security concerns throughout his incarceration with the Department of Correction.

THE COURT: Response, Mr. Muhammad?

THE PLAINTIFF: Again, I refer back to the decision in *Mayweathers* that the defendants just finished referring to. They may not have -- we don't exactly know all the reasons the California Department of Correction had for having the grooming policy The main one here that was addressed was about altering your appearance in the event of an escape.

And if you look at page six of that particular decision, under the compelling interest, least restrictive -- least restrictive means, the district court in that case, and they cited some other cases that dealt with it out of different circuits, the Second Circuit, District of Arizona, and things of that nature, they were arguing in this case, and in fact the defendants have argued here today about altering appearances. They have gotten up here and said that, that they were concerned about this type of thing. So I go back to this, and which if I may, Your Honor, read -- read here what was said in this -- in this order handed down by the Ninth Circuit, and it says that:

> "Defendants' rationale that an inmate with a beard can more easily alter his appearance after he escapes is not persuasive. Common sense and experience recognizes that a prisoner may not

only shave, but alter his appearance in any number of ways to evade authorities after escape. Moreover, while it is plausible that altering a six inch beard or cutting very long hair may assist an escapee to elude capture, I must agree with Judge Strand that shaving a half inch beard likely cannot."

And then it cites *Luckette v. Lewis*, and which it said:

"Prison officials do not meet their burden of demonstrating a compelling interest for not allowing a short, kempt beard."

In *Fromer v. Scully*, they also cite this case, as well:

"It is certainly not irrational to believe that a full beard, which may well extend for significant lengths sideways from the cheeks as well as downwards from the chin, may impede identification more than a one inch beard."

And as Magistrate Judge Moulds concluded:

"When it comes to changing ones appearance through the growth or removal of hair, this court finds that not all beards are equal."

You understand what I'm saying? And this here, he specifically addresses some of their concerns that they got up on that stand and told you today, altering appearances. It's -- I don't want to be in any way disrespectful to these men, but at times it sounds like they're changing horses in midstream because, at first, their first argument was, throughout the Administrative Remedy process, that hiding weapons or contraband in the facial hair is the reason -- the reason that inmates are not allowed to grow their beards in the Department of Correction. Now we're hearing stuff about altering appearances. Now we're hearing --

THE COURT: Well, Mr. Muhammad, I didn't perceive that. I perceived that to be a two pronged approach on what they said it was. It was both of those reasons, which, I mean, it frankly is a problem for you, Mr. Muhammad, because that's what the *Fegans* court analyzed. I mean, I understand the Ninth Circuit rejects the alteration of appearance point, but, you know, *Fegans* partially hangs its hat on that issue. So, I mean, I don't -- I've got to study up on it a little bit more here in a minute, but it seems to me that *Fegans* says

it's -- it's the risk of contraband and it's the risk of being able to alter your appearance should you escape. I mean, like I say, I understand that's what the California court in the Ninth Circuit have held, but, you know, that's in contradiction to what the Eighth Circuit has held. The Eighth Circuit is more persuasive in this court.

THE PLAINTIFF: I understand that. What I'm saying is this, when it's all said and done, the fact that requiring people to cut their beards is not going to dramatically alter the flow of contraband into the prison. It's not going to. They even said the past six years it's been coming in an increase in it. Having a beard is not going to cause that increase any more than what it already is.

And you heard testimony that a quarter inch beard can be grown the same way, it can be some on one -- one, on one person, and different on another. The same for a half inch beard. If one can be, they both can be.

You heard testimony that a thick mustache could hide some contraband in it, but they're not required to shave the mustache off What I'm saying is, if -- if we're going -- for consistency's sake here, I mean, let's look at it for -- for what it is.

THE COURT: This is supposed to be rebuttal, I want you to stick to -- if you've got anything else, you've made an argument already and you're kind of going back to making

another argument. It's --

THE PLAINTIFF: I understand, Your Honor.

THE COURT: Okay. I hear your points, Mr. Muhammad, and they're good ones. And so I've got to go and get my thoughts together and let you know where I'm coming from.

THE PLAINTIFF: There is one other argument I want to address that Ms. Cryer made. She made the comment regarding the fact that about the -- the injunction applying just to me at this point. First off, the Court hasn't ruled on class certification. It had --

THE COURT: Let me speak to that right now, Mr. Muhammad, because it seems to me that these are individual -- and again, that was a mistake I made, was, you know, these are individual cases, and I think the court in *Fegans* requires me to individually look at the cases. I mean, the testimony may be exactly the same, but it may not be. And so, my reading of *Fegans* and my preparation for coming out here today leads me to conclude that, you know, it would be improper to let defendants [sic] add on to your case. Your case is a particular case and I think the analysis has to be on each particular claim. So I think that those defendants [sic] are going to have to file their own cases. And I understand that, you know, some of them may be similarly situated, some of them may not be. I think that was the argument in response, was that they may not be. But I think that they're going to have

to file them independently.

Yes, ma'am?

MS. CRYER: You just said defendants. I wanted to make sure --

THE COURT: I'm sorry. Plaintiffs.

MS. CRYER: -- we're talking about --

THE COURT: I'm sorry Yes, ma'am.

MS. CRYER: I just wanted to make sure. Thank you.

THE COURT: Plaintiffs.

MS. CRYER: Thank you.

THE COURT: So I'm pretty sure I'm going to have to deny your request for these additional defendants [sic] to come in, because I think they're going to have to plead their own cases and we're going to have to look at them individually, because that's -- that's how I read *Fegans*, and the law, you know, the RLUIPA is a case by case analysis, and it's -- again, it kicks the burden back to the defense to say here are our legitimate penological aims here, and then, you know, again, as you point out, is that the least restrictive means to the ends that they're trying to achieve.

THE PLAINTIFF: I would say then that the only -- the major difference between myself and *Fegans* is, again, I'm not arguing an unrestricted hair growth, unrestricted beard growth. I can understand where the state would have a security concern with that. I agree with that.

We're talking about a half inch beard. And that's -- that's what I --

THE COURT: And I hear your point loud and clear and it's a good one.

THE PLAINTIFF: Thank you, sir.

THE COURT: All right. Well, if you all will give me just a few minutes and I will come back with just some preliminary findings. And then, obviously, you know, the way it works is whatever ruling I make, it goes to Judge Miller for his adoption or rejection, and then you all would have a chance to, you know, respond to my ruling, and then he ultimately gets the say so, and then you would have a right to appeal his ruling.

Yes, sir?

THE PLAINTIFF: Can I ask you one question?

THE COURT: You may. You all be seated, please. Please have a seat.

THE PLAINTIFF: Depending on how you rule, if this is -- if this is a recommendation to send to Judge Miller, correct, what would be the binding ramifications of it at this -- at this point in time, if it's up to Judge Miller to accept or reject, and he would have the ultimate say, what would be the binding, at this point in time, between now and when he makes a ruling on it, where would that stand? That's all I'm asking.

THE COURT: Well, I'll address that, Mr Muhammad. I'll address that. All right?

THE PLAINTIFF: Okay. Okay.

THE COURT: All right. You all rest easy, please, I'll be back in a few minutes.

(Recess.)

AFTER RECESS

THE COURT: All right. We're back on the record.

And Mr Muhammad, Ms. Cryer, you know I did a lot of research before coming out here because I think this is a pretty -- pretty close call in this case and I think the case law right now as it stands is, you know, somewhat in a state of flux with specific regard to beards, with what happened in the Ninth Circuit and then this Eighth Circuit case with the dissent from Judge Melloy makes it pretty interesting.

But for today, I'm to consider four factors. One, the threat of irreparable harm to you, Mr. Muhammad, if I don't grant your request for an injunction. The state of balance between the harm and the injury that granting injunction will inflict on the other party litigants. The probability that you will succeed on your merits. And the public interest. So those are the four factors for the immediate issue.

You know, Mr Muhammad, I don't think it would be irreparable harm to you if you were forced to comply with the

grooming procedure until you were ultimately to win, if you're able to do so, so I think that probably favors the defense. Although I do understand -- you know, your religious principles are not lost on me, and the issues that you've raised; however, as you stated yourself, and you admit that, you know, the fact that you're willing to try to do right by your religious principles, you still get credit for that. And certainly, you have done a lot. You've been very effective in this case. And today, you know, your arguments are right on point and, you know, you have -- you have done great things in order to achieve your ends on being able to grow your facial hair. So you should, obviously, get big credit for that in your religion, because you have done a good job.

In the state of harm and the injury in granting what, in granting it -- what granting injunction could inflict on the other party litigants, and then I think that also goes with the probability of succeeding on the merits, and that's where I really think the -- the issue lies, or the most important part of this case is, are those two factors. And it ultimately has to do with the concepts of safety, security, good order and discipline. The fact that I am obligated to, by Supreme Court law, and the other precedent out there, to give deference to prison officials in running prisons, and the fact that the *Fegans* case is from the Eighth Circuit and is very, very closely on point, and you've done a good job, Mr

Muhammad, of distinguishing the fact that you want the half inch, that *Fegans* was arguing for a more -- more freedom in growing his beard, but the principles are still the same. The principles are, as I said, deference to the prison officials if they're able to state legitimate penological needs. And I think they have done so. And I think they've done so, and I think that when you look at *Fegans* with the facts in this case, and ultimately, the analysis that the Eighth Circuit, the majority, used in order to come to the conclusion that they did, it's really -- I'm really constricted by that -- by that holding. Okay Mr. Muhammad, and the holding is that they're able to come in, they're able to articulate reasonable security issues. You know, albeit looking at you and your beard, and as your Ninth Circuit case says that not all beards are alike, or maybe that was a district court case, you know, I look at your particular circumstance and I say, you know, it's almost preposterous to think that you could hide contraband in your beard, but there's a bigger picture here, and I think that the law is that they get deference, and if they're able to articulate that there is a concern, and even the *Fegans* case says it doesn't have to be that the concern has actually materialized. Okay? It's a -- it's a concern based on their experience and their knowledge, which is pretty particular, and in this case here we've got more than 60 years of prison experience, starting from the ground, all the way to

the top.

And so, I do give -- I do give credit to their testimony. I was impressed by Mr. Harris with the SIM card and I do -- I'm very aware of the issue of cell phones and the fact that the SIM card is a very important piece of the puzzle when talking about smuggling in cell phones and SIM cards into prison. And it's a very -- a very well made point that I think I have to consider strongly in their favor

The good order and discipline. You know, again, I'm not in the prison administration business. They've articulated legitimate reasons to state that it is actually necessary to have this grooming policy.

And also, Mr Muhammad, you know, you bring up the point, and it's a good one, that is it the least restrictive means. And *Fegans* squarely addresses the -- it's the exact same testimony, it's the exact same analysis, and so while you make a really good argument, Mr Muhammad, I -- I am very much constrained by the holding in *Fegans*. I think that I would be, you know, not doing my job if I didn't apply *Fegans* as persuasive authority that tells me exactly what I have to do in this case. And I could look to the Ninth Circuit case because, you know, the Ninth Circuit case goes your way, and it comes up with a very different conclusion, but that's not my job; my job is I've got to hold with the Eighth Circuit. And until they say otherwise, I'm constricted by that holding.

All right.

And again, I mean, not that I -- I'm not trying to say here that I am in disagreement with the holding in *Fegans*, because I do believe, again, as I came out here straight out and said that, you know, I find myself in a very difficult position in a case like this because, you know, it is not my expertise and I am not in a good -- I'm not a good person to be asked to get involved in prison administration, and so I do agree that the defense here has brought up legitimate points, they are well taken.

And let me also say that one of the other points on *Fegans* was the -- the being able to alter your appearance should you escape. And that's why I asked you, Mr. Muhammad, I felt like what they said was that it's not just the one point, the smuggling contraband, it's both points. And I think that is an important point. While the court in California rejected that, I disagree with that. I think that that is a very legitimate concern and it's been well articulated by the defense.

And so, I'm going to find that based on those two factors in *Fegans* that the likelihood that you could win this case on its merits, given that precedent, it's unlikely, and, therefore, I should deny your motion for injunctive relief at this time.

Now, you asked a point, Mr. Muhammad, and I want to

address it, you know, where does that -- basically, where does that leave you today? What I will order is that nothing change from what's already occurred. What I will do is I will, as quickly as possible, enter a written order saying what I've just said. And it will go up to Judge Miller. You will have an opportunity, Mr Muhammad, to object to anything I say in writing. And we'll give you instructions -- you know how it works. And, Ms. Cryer, you can also object or supplement or whatever you want to do. And then Judge Miller will have the ultimate say so in how he wants to proceed, because ultimately he has this case, and as it proceeds, you know, and he may reject my conclusions and you may be in good business -- in good stead with your injunction for the future. But those are my findings, Mr Muhammad, and I will enter a written order saying so. All right.

Yes, sir?

THE PLAINTIFF: There's one thing I wanted to address. As part of that injunction, it stated that in my petition -- because this is something that's become a real issue with me there at the penitentiary, at Cummins Unit, that -- that the defendants be banned or barred from transferring me to another institution in retaliation for this litigation. It's a common tactic ADC uses to disrupt litigation. You understand what I'm saying? And I'm asking that that be entered -- that that be -- that that part still be specified

in the order, because that was part of Judge Miller's --

THE COURT: I'm going to just say whatever Judge Miller has ordered remains in effect and will remain in effect because he has the ultimate say so, so I don't know what's in that order. But, Ms. Cryer, do you want to speak to that? I mean --

MS. CRYER: Your Honor, I was just going to say, I mean, we will -- we will comply with whatever the order says. My understanding is the order refers to the department, not just to the Cummins Unit. I don't think there's -- I'm not aware of any talk or anything about transferring Mr Holt to another institution. I don't see how that helps us to do that. The case doesn't go away if he's transferred and currently there is a pending -- there's an order still in effect, so. And I -- yeah.

THE COURT: Yeah. Like I said, whatever Judge Miller previously ordered remains in effect. I'll enter my order, like I said, as quickly as possible to get this thing resolved for some finality, at least for now. All right. Any other points, Mr. Muhammad?

THE PLAINTIFF: No, sir

THE COURT: All right. Ms. Cryer, anything?

MS. CRYER: No, Your Honor

THE COURT: All right. Well, we'll be adjourned. Thank you all.

THE PLAINTIFF: Thank you.

MS. CRYER: Thank you.

(Adjournment at 12:46 p.m.)

ELECTRONIC SOUND RECORDING CERTIFICATION:

I, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

/s/Robin Warbritton
Signature of Approved Transcriber

November 25, 2013
Date

Robin Warbritton
Typed or Printed Name

REPLY BRIEF

No. 13-6827

In the Supreme Court of the United States

GREGORY HOUSTON HOLT
A/K/A ABDUL MAALIK MUHAMMAD,
PETITIONER

v.

RAY HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, *ET AL.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. The Judgment Below Is Based on a Legal Rule That Conflicts with the Rule in Other Circuits.

Respondents say that all circuits have applied the same legal standard to varied facts. BIO 10-15. And they say they should win on the merits. BIO 17-21. The findings of fact, and the Magistrate's review of the evidence, refute both claims. The judgment below was based on an Eighth Circuit *rule* that requires extraordinary deference to prison officials. That rule conflicts with the rule of other circuits, and it negates the statutory standard that governs this case.

A. The Judgment Below Was Rendered in Spite of the Facts, not Because of the Facts.

The Magistrate is the only judicial officer who either heard the witnesses or saw petitioner's beard. His recommendations were based on the Eighth Circuit rule, despite his view of the facts: "After hearing testimony of two ADC officials concerning the specific rationale for the ADC grooming policy, this Court finds that the principles in *Fegans* apply ...." 2012 WL 994481, *1 (E.D. Ark., Jan. 27, 2012). *Fegans* is *Fegans v. Norris*, 537 F.3d 897 (8th Cir. 2008). After summarizing respondents' testimony, the Magistrate said:

> Although Plaintiff makes *compelling* arguments that an inmate could easily hide contraband in many places other than a one-half-inch beard, the prison officials are entitled to deference. *Gladson v. Iowa Dep't of Corrs.*, 551 F.3d 825, 831-32 (8th Cir. 2009). And the safety and security concerns advanced by the ADC officials are *reasonable* — particularly the fact that an escaping inmate could quickly change his appearance by shaving off his beard. *Regardless*, the concerns expressed by the ADC officials are nearly identical to those embraced by the majority in *Fegans*, 537 F.3d 898.

2012 WL 994481, *4 (emphasis added). Plaintiff's arguments were compelling, defendants' testimony was merely reasonable, but regardless, I am bound by precedent. The District Judge fully adopted these views. "[T]he proposed findings and recommended disposition should be, and hereby are, approved and adopted *in their entirety in all respects*." Order at 1 (Doc. 93, March 23, 2012) (emphasis added).

In his oral review of the evidence, not expressly adopted by the District Judge, the Magistrate was more blunt. Addressing petitioner, the Magistrate said:

> *[I]t's almost preposterous* to think that you could hide contraband in your beard, but there's a bigger picture here, and I think that the law is that they get deference, and if they're able to *articulate* that there is a concern, and even the *Fegans* case says it doesn't have to be that the concern has actually materialized.

Transcript 106 (Jan. 4, 2012) (Appendix to BIO) (emphasis added).

The Magistrate repeatedly said he was "constrained" or "restricted" by *Fegans*:

> [S]o while you make a really good argument, Mr. Muhammad, I — *I am very much constrained* by the holding in *Fegans*. I think that I would be, you know, not doing my job if I didn't apply *Fegans* as persuasive authority that *tells me exactly what I have to do* in this case.

Tr. 107 (emphasis added). And again: "I'm *constricted* by that holding." *Ibid.* And again: "I'm really *constricted* by that — by that holding." Tr. 106 (all emphases added).

The Magistrate felt constrained even though the facts in *Fegans* were quite different:

> [Y]ou've done a good job, Mr. Muhammad, of distinguishing the fact that you want the half inch, that Fegans was arguing for a more — more freedom in growing his beard, but the principles are still the same. The principles are, as I said, deference to the prison officials if they're able to *state legitimate penological needs*.

Tr. 105-06 (emphasis added). Fegans wanted "shoulder-length hair" and a beard that was "uncut altogether." 537 F.3d at 904, 906. But facts didn't matter. The Magistrate understood the Eighth Circuit rule to require deference to whatever respondents said.

The Eighth Circuit affirmed after summarizing respondents' testimony in one conclusory sentence. 509 Fed. Appx. 561, 562 (8th Cir. 2013). It too relied on *Fegans*, and it too ignored factual differences between the cases. *Fegans* had principally relied on *Hamilton v. Schriro*, 74 F.3d 1545 (8th Cir. 1996). 537 F.3d at 902. Hamilton wanted hair of unlimited length; his hair had once been four-feet long. *Id.* at 1548. But factual differences were no more relevant in *Fegans* than here. A half-inch beard, an uncut beard with shoulder-length hair, or four feet of hair potentially tied up in an enormous ball — these are all the same in the Eighth Circuit. These cases have not turned on facts, but on a rule of effectively unlimited deference to prison officials.

B. The Eighth Circuit Rule Is a Weaker Version of the Pre-RLUIPA Constitutional Rule.

The Magistrate understood *Fegans* to require him to rule for respondents if they could "state" or "articulate" "legitimate penological needs." Tr. 106. But reasonable relationship to "legitimate penological objectives," or "legitimate penological interests," is the *constitutional* standard. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349, 352 (1987); *Turner v. Safley*, 482 U.S. 78, 87, 89 (1987).

RLUIPA provides a more protective *statutory* standard. RLUIPA requires respondents to "*demonstrate[]*" their interests, not "state" or "articulate" them, and to demonstrate "compelling governmental interest" and "least restrictive means," not

just any "legitimate" interest. 42 U.S.C. §2000cc-1. "Demonstrate[]" means to meet the burdens of going forward and of persuasion. §2000cc-5(2).

Of course the prison "context matters," prison security is a compelling interest, and the expertise of prison officials is entitled to "due deference." *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005). But not everything prison officials do is necessary to security — let alone the least restrictive means. Courts must decide when expertise is genuine and how much deference is "due." The essentially unlimited deference in the Eighth Circuit effectively repeals the statute, putting the constitutional standard in its place.

This substitution clearly appears in the evolution of the Eighth Circuit rule. The court below closely paraphrased the *Fegans* rule that effectively puts the burden of proof on petitioner: "absent substantial evidence in record indicating that response of prison officials to security concerns is exaggerated, courts should ordinarily defer to their expert judgment in such matters." 509 Fed. Appx. at 562 (citing *Fegans*). *Fegans* quoted this rule from *Hamilton*; both opinions italicized "substantial." *Fegans*, 537 F.3d at 903 (quoting *Hamilton*, 74 F.3d at 1553). *Hamilton* quoted this rule from *Pell v. Procunier*, 417 U.S. 817, 827 (1974) — a constitutional case and the first opinion in this Court to invoke "legitimate penological objectives." *Id.* at 822. *Hamilton* also relied on *Iron Eyes v. Henry*, 907 F.2d 810 (8th Cir. 1990). 74 F.3d at 1554-55. *Iron Eyes* was a long-hair case decided under the constitutional standard — reasonable relationship to legitimate penological interests. 907 F.2d at 813.

This Court characterized *Pell* and three similar cases in *Turner*:

> In none of these four 'prisoners' rights" cases did the Court apply a standard of heightened scrutiny, but instead inquired whether a prison regulation that burdens fundamental rights is "reasonably related" to legitimate penological objectives, or whether it represents an "exaggerated response" to those concerns.

482 U.S. at 87.[1] So *Pell* did *not* apply "heightened scrutiny," and it was assimilated to the constitutional standard of reasonably related to legitimate penological interests. *Ibid.* But the Eighth Circuit applies *Pell* in RLUIPA cases, even though RLUIPA *requires* heightened scrutiny — requires the compelling-interest and least-restrictive-means test, tempered by "due" deference to prison officials. When that deference is so great that it reverts to the constitutional standard, deference effectively negates the statutory standard.

Hamilton arose under the Religious Freedom Restoration Act, 42 U.S.C. §2000bb *et seq.* (1994), when that Act applied to the states. Like RLUIPA, RFRA required compelling interest and least restrictive means. Relying principally on one sentence of the Senate committee report, *Hamilton* reasoned that Congress meant in prison cases to restore the standard that governed before *O'Lone*. 74 F.3d at 1552 (quoting S. Rep. 103-111, 1993 U.S.C.C.A.N. 1892, 1899). In concluding that this meant the *Pell* standard, the court disregarded the committee's explanation that it meant a higher level of scrutiny derived from a different line of cases. *Ibid.* More important, the court relied almost exclusively on legislative history and gave essentially no weight to the statutory text.

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[1] The other three cases referenced were *Block v. Rutherford*, 468 U.S. 576 (1984); *Bell v. Wolfish*, 441 U.S. 520 (1979); and *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977).

In practice, the Eighth Circuit standard is *more* deferential than the constitutional standard. This Court's constitutional cases engaged in substantial analysis of the challenged prison rules. *O'Lone*, 482 U.S. at 350-53; *Turner*, 482 U.S. at 91-99. In *Turner*, the Court unanimously struck down Missouri's ban on most prisoner marriages, despite testimony that the ban served security and rehabilitation interests. The Court found that testimony exaggerated, illogical, and unable to explain why the federal prison system's more individualized rule would not suffice. *Id.* at 97-99. In contrast, the Magistrate here reasonably understood the Eighth Circuit to require that he defer even to testimony that was "almost preposterous." Tr. 106.

C. This Eighth Circuit Rule Conflicts with the Rule in Other Circuits.

Other circuits give much closer scrutiny to the testimony of prison officials. Petitioner has documented express circuit splits on whether respondents must actually consider less restrictive measures, and whether they must demonstrate why they cannot adopt less restrictive practices from other prison systems. Pet. 6-10; Supp. Br. 2. The Eleventh Circuit has explicitly acknowledged the split on these issues. *Ibid.* Respondents claim that these disagreements are merely details of implementing a uniform underlying standard. BIO 15-16. And they say the Eleventh Circuit agrees with the Eighth. BIO 14. This last point is true. The Eighth and Eleventh Circuits are on one side of the split; the First, Second, Third, Fourth, Fifth, and Ninth are on the other. Supp. Br. 2-5.

On the fundamental question whether courts must defer to prison officials' testimony no matter how conclusory or implausible, the Tenth Circuit just joined the more protective side of the split. *Yellowbear v. Lampert*, 2014 WL 241981 (10th Cir., Jan. 23, 2014) (Gorsuch, J.). *Yellowbear* gave content to the idea of deference in the context of strict scrutiny: "[T]he deference this court must extend the experience and expertise of prison administrators does not extend so far that prison officials may declare a compelling governmental interest by fiat." *Id.* at *9. Rather, deference may "nudge a questionable case across the line." *Ibid.* Neither of those statements is consistent with the rule in the Eighth Circuit.

Respondents say that conflicting outcomes in different circuits merely reflect different evidentiary records. But judicial characterization of the evidence inevitably reflects the degree of deference to prison officials.

Unlike the Eighth Circuit, *Yellowbear* carefully examined the state's evidence. 2014 WL 241981, *5-*13. It emphasized that merely *considering* less restrictive alternatives is not enough. "[T]he government's burden here isn't to *mull* the claimant's proposed alternatives, it is to *demonstrate* the claimant's alternatives are ineffective to achieve the government's stated goals." *Id.* at *12.

Or consider *Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005). The court said the prison officials had offered "only conclusory statements." BIO 11. Yet that testimony, summarized in 418 F.3d at 997, was at least as detailed as that of respondents here. *Warsoldier* examined the plausibility of that testimony in light of other information. *Id.* at 997-1001. The Eighth Circuit summarized respondents'

testimony in one sentence and accepted it without analysis. 509 Fed. Appx. at 562. *Warsoldier* required proof that defendants had "actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." 418 F.3d at 999. The Eighth Circuit did not. *Warsoldier* gave significant weight to the practices of other prisons. *Id.* at 999-1000. The Eighth Circuit explicitly did not. 509 Fed. Appx. at 562.

Similarly in *Garner v. Kennedy*, 713 F.3d 237 (5th Cir. 2013), the court rejected the state's cost argument because there had been no cost studies and the alleged costs were unquantified. *Id.* at 245-46. *Yellowbear* made a similar point. 2014 WL 241981, *8. In *Garner*, the state justified its no-beard rule in part on the ground that prisoners could change their appearance by shaving a beard. The court rejected that justification on three grounds: Prisoners could change their appearance in other ways permitted by the rules, prison officials could take a new photograph if an inmate changed his appearance, and other large prison systems permit beards. *Id.* at 247. Petitioner emphasized all three of these points below. Tr. 39, 49-50, 53, 56-57, 97-98. The difference is not in the evidence, but in the standard of review.

Strict scrutiny may be a familiar standard, BIO 16, but strict scrutiny combined with due deference is *not* familiar. The conflicting cases reveal substantial disagreement about this standard. This Court should resolve the disagreement.

II. Respondents Offered Only Conclusory Testimony.

Respondents say that certiorari should be denied because they so clearly justified their policy. BIO 3-7, 17-21. They did not. Their conclusory and illogical justifications were accepted only because the Eighth Circuit rule requires such a high degree of deference.

Respondents say that prisoners can hide contraband in a half-inch beard; they particularly emphasize cell-phone SIM cards. BIO 5. This is the testimony that the Magistrate found "almost preposterous." Tr. 106. The Magistrate measured the SIM card at 9/32 by 13/32 of an inch — nearly as long as petitioner's beard. Tr. 79. It would be far easier for a prisoner to drop a SIM card in his shoe, or in a pocket. The item would be much better hidden, and gravity would work for concealment instead of revelation. Respondents' agreed that prisoners hide contraband in many places, including clothes, socks, shoes, boots, coats, and the hair on top of their heads. Tr. 51, 56, 58, 78. The SIM card "can be concealed just about anywhere." Tr. 67. Pieces of phones "have been walked down the hall in flip flops." *Ibid.* Officers smuggle contraband for prisoners. Tr. 73. Respondents' were reduced to arguing that a half-inch beard provided one more place. Tr. 58. But common sense and the Magistrate's assessment show it to be an especially ineffectual place.

Respondents argue that officers might cut themselves if they have to run their hands through petitioner's beard searching for contraband. BIO 5-6, 19. But this danger depends on the premise that contraband could be hidden there in the first place. And officers could require prisoners to vigorously run their own hands through

their beards, dislodging anything hidden there. Pet. 10. Respondents try to explain why some of petitioner's suggested alternatives wouldn't work, BIO 19-20; they make no effort to refute this one.

Respondents say that prisoners can alter their appearance by growing or shaving beards. Petitioner asked each witness why respondents could not require a clean-shaven photo of each prisoner on admission, and a second photo if he grew a beard. Tr. 56. Warden Lay gave an utterly nonresponsive answer, simply listing ways in which inmates might change their appearance. *Ibid.* Assistant Director Harris said only that Warden Lay had already answered that question, and immediately returned to talking about contraband. Tr. 74.

Respondents suggest without citation that two photographs would be unworkable for 15,000 prisoners. BIO 18. Neither witness said anything like that in response to the photograph question. And the magistrate had just said, in a different context, "I didn't find it very compelling that having to manage 15,000 people with beards is at issue either, so." Tr. 55. Many men do not want beards, and of those who do, only those with religious motivations are protected by RLUIPA.[2]

Respondents say they cannot enforce a half-inch beard rule because they cannot tell how long a beard is. BIO 18. But they allow quarter-inch beards for medical reasons. BIO 1. They do not explain how they can estimate a quarter-inch but not a half-inch; no explanation is possible. As Warden Lay volunteered, "you could start, I guess, with a particular clipper guard that's a particular length." Tr. 37.

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[2] Counsel has not found this fact in the record, but petitioner represents that respondents photograph all prisoners annually at Cummins and every ninety days at Varner, the two units where he has been housed.

At least one state provides a sketch of a rule-compliant haircut. Dawinder S. Sidhu, *Religious Freedom and Inmate Grooming Standards*, 66 U. Miami L. Rev. 923, 963 (2012) (reprinting Alabama's sketch). If half-inch clippers and general familiarity with half an inch are not enough, respondents could provide guards and prisoners with similar sketches — or photographs — of compliant half-inch beards.

Respondents say that allowing petitioner but not others to grow a beard would give petitioner special privileges and potentially generate a hostile reaction. BIO 5. At trial, this was generalized in a question about "any inmate that is allowed to do something that other inmates are not allowed to do." Tr. 70. Mr. Harris answered, "That's the last thing you would want to happen in an institution." *Ibid.* Nothing better illustrates respondents' refusal to take RULIPA seriously. RLUIPA necessarily requires religious exceptions; respondents claim a compelling interest in never granting any exception to anyone for anything.

Petitioner testified that the California prison system allows half-inch beards, citing *Mayweathers v. Terhune*, 328 F. Supp. 2d 1086 (E.D. Cal. 2004). Tr. 9-10. He cross-examined about why respondents could not permit beards as other prison systems do. Respondents knew nothing of the experience of these other systems, and had made no effort to learn. Tr. 53-54, 57-58, 62-63, 71, 77, 82.

In fact, thirty-nine states, the United States, and the District of Columbia permit beards either for all prisoners or for prisoners with religious motivation. Prison grooming policies are collected in Sidhu, 66 U. Miami L. Rev. at 964-72. Pennsylvania limits beards to three inches; none of the other permissive jurisdictions limit beards

to any specific length. California has since repealed the half-inch limitation that petitioner described. Some jurisdictions impose qualitative limits for hygiene, sanitation, identification, or security.

Of the remaining eleven states, Idaho and Mississippi allow half-inch beards and Indiana allows 1-1/2 inch beards. Texas recently had its no-beard rules invalidated. *Garner*, 713 F.3d 237. That leaves at most seven jurisdictions with rules as restrictive as respondents': Alabama, Arkansas, Florida, Georgia, South Carolina, Virginia (which failed to sustain its rule on summary judgment, *Couch v. Jabe*, 679 F.3d 197 (4th Cir. 2012)), and possibly Louisiana, which tightly limits hair length but does not mention beards in the rule that Professor Sidhu quotes.

It is hard to imagine a compelling interest in refusing religious exceptions to a rule that forty-five jurisdictions do not enforce. Certainly respondents cannot "demonstrate[]" a compelling interest without considering the experience in these jurisdictions. Respondents' say that petitioner did not introduce these policies below. BIO 21. But he repeatedly raised the issue posed by these policies, and the burden of proving compelling interest and least restrictive means is on respondents.

Respondents say that contraband is a special problem at the Cummins Farm, because it has open barracks and work sites outside the fence. BIO 4. But that does not make a half-inch beard a better hiding place, and all prisons constantly fight contraband; that problem is hardly unique to Cummins. Nor do respondents disclose that they transferred petitioner to the Varner Supermax unit, so that any unusual features at Cummins have become mostly or entirely irrelevant.

Finally, respondents point to petitioner's verbal outburst against a barber that petitioner accused of cutting off his beard. BIO 3; Tr. 24-26, 35-37, 47-49. The incident led to a grievance by petitioner, not to a disciplinary action against him. See Tr. 47. So it was probably not as serious as respondents now try to portray it. The facts were disputed and the Magistrate did not resolve them, but one thing is clear. The barber was trained, if at all, under respondents' current policy. The incident has little predictive value for barbers trained under a policy that complies with RLUIPA.

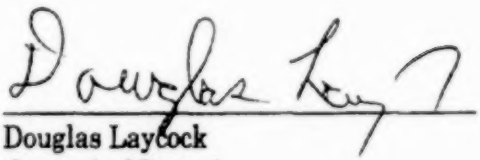
No deference is "due" to respondents' testimony in this case. They reflexively rejected, without serious thought, every argument for half-inch beards. They claimed expertise but knew nothing of experience elsewhere. Their testimony was variously implausible, illogical, evasive, and "almost preposterous." Tr. 106. They simply refuse to take seriously the possibility that RLUIPA may sometimes require exceptions to prison rules.

The factual claims in respondents' Brief in Opposition required this somewhat detailed review of the evidence. But this is not just a case about error correction. It is about the Eighth Circuit rule that required deference to this implausible testimony — deference so great that it effectively negates an act of Congress. And it is about clarifying an important but unfamiliar standard of review: compelling interest with due deference to defendants' expertise.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,



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February 3, 2014

No. 13-6827

In the Supreme Court of the United States

GREGORY HOUSTON HOLT
A/K/A ABDUL MAALIK MUHAMMAD,
PETITIONER

v.

RAY HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, *ET AL.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CERTIFICATE OF SERVICE

I, Douglas Laycock, a member of the bar of this Court, certify under penalties of perjury that on February 4, 2014, I served Petitioner's Reply Brief on all counsel required to be served, to wit: Ms. Christine Ann Cryer, who is counsel of record for respondents, by e-mail to christine.cryer@arkansasag.gov and by overnight express to

Ms. Christine Ann Cryer
Office of the Attorney General
323 Center St., Suite 200
Little Rock, AR 72201
501-682-1319.

RECEIVED
FEB - 6 2014
OFFICE OF THE CLERK
SUPREME COURT, U.S.

February 4, 20

Douglas Laycock
Counsel of Record for Petitioner

UNIVERSITY of VIRGINIA SCHOOL OF LAW

Douglas Laycock

ROBERT E. SCOTT DISTINGUISHED PROFESSOR OF LAW
PROFESSOR OF RELIGIOUS STUDIES
ALICE MCKEAN YOUNG REGENTS CHAIR IN LAW EMERITUS, UNIVERSITY OF TEXAS AT AUSTIN

February 4, 2014

Mr. Christopher Vasil
Chief Deputy Clerk
Supreme Court of the United States
1 First St., NE
Washington, DC 20543

RE: Holt v. Hobbs, No. 13-6827

Dear Mr. Vasil:

I enclose for filing an original and ten copies of Petitioner's Reply Brief in the captioned case, and a Certificate of Service.

Earlier filings in the case have already been distributed for the February 21 conference. I would be grateful if this Reply Brief could be docketed and distributed promptly.

Very truly yours,

Douglas Laycock

580 MASSIE ROAD • CHARLOTTESVILLE, VA 22903-1738 •
PHONE: 434-243-8546 • FAX: 434-924-7536 • DLAYCOCK@VIRGINIA.EDU

JOINT APPENDIX

No. 13-6827

In The
Supreme Court of the United States

GREGORY HOUSTON HOLT
a/k/a ABDUL MAALIK MUHAMMAD,

Petitioner,

v.

RAY HOBBS, DIRECTOR, ARKANSAS
DEPARTMENT OF CORRECTION, *ET AL.*,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit**

JOINT APPENDIX

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Petition For Certiorari Filed Sept. 27, 2013
Certiorari Granted March 3, 2014

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Relevant Docket Entries for the
U.S. District Court
Eastern District of Arkansas (Pine Bluff)
CIVIL DOCKET FOR CASE #: 5:11-cv-00164-BSM

Plaintiff

Gregory Holt
ADC #129616
(Abdul Maalik Muhammad)

V.

Defendant

Ray Hobbs
Director, Arkansas Department of Correction

Date Filed	No.	Docket Text
06/28/2011	1	MOTION for Leave to Proceed in forma pauperis by Gregory Holt (pag)(copy mailed) (docket text modified on 6/29/2011 to correct plaintiff's name) (bfw). (Entered: 06/29/2011)
06/28/2011	2	COMPLAINT with Jury Demand against All Defendants filed by Gregory Holt(pag) (copy mailed) (docket text modified on 6/29/2011 to correct plaintiff's name) (bfw). (Entered: 06/29/2011)
06/28/2011	3	MOTION for Preliminary Injunction and Temporary Restraining Order by Gregory Holt (pag)(copy mailed) (docket text modified on 6/29/2011 to correct plaintiff's name) (bfw). (Entered: 06/29/2011)

06/28/2011	4	BRIEF IN SUPPORT re 3 Motion for Preliminary Injunction and for TRO filed by Gregory Holt. (pag)(copy mailed) (docket text modified on 6/29/2011 to correct plaintiff's name) (bfw). (Entered: 06/29/2011)
07/06/2011	7	PROPOSED FINDINGS AND RECOMMENDATIONS recommending 3 Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order be DENIED. Objections to R&R due no later than 14 days from the date of this Recommendation. Signed by Magistrate Judge Joe J. Volpe on 7/6/2011. (srw) (Entered: 07/06/2011)
07/14/2011	10	OBJECTION to 7 Report and Recommendations by Gregory Holt (pag)(copy mailed) (Entered: 07/14/2011)
07/21/2011	12	MOTION to Amend/Correct 2 Complaint by Gregory Holt (pag)(copy mailed) (Entered: 07/21/2011)
07/21/2011	13	EXHIBITS filed by Gregory Holt to 2 Complaint (pag)(copy mailed) (Entered: 07/21/2011)
07/27/2011	16	Letter from Robert Hawk (pag)(copy mailed) (Entered: 07/28/2011)
08/03/2011	17	MOTION for Leave to Proceed in forma pauperis by Gregory Holt (pag)(copy mailed) (Entered: 08/03/2011)

08/09/2011	20	ORDER granting 17 Plaintiff's Application to Proceed Without Prepayment of Fees; denying as moot 11 Plaintiff's Motion for Extension of Time; directing monthly payments be made from Plaintiff's institutional account for the statutory filing fee of $350; directing the Clerk of the Court to send a copy of this Order to the Warden of the Cummins Unit and appropriate ADC offices; and finding service is not appropriate at this time. Signed by Magistrate Judge Joe J. Volpe on 8/9/2011. (srw) (Entered: 08/09/2011)
09/01/2011	24	DECLARATION of Vernell Conley, by Gregory Holt. (kdr) (Entered: 09/02/2011)
09/01/2011	25	DECLARATION of Carlos Gutierrez, by Gregory Holt. (kdr) (Entered: 09/02/2011)
10/18/2011	28	ORDER rejecting Magistrate Judge Joe J. Volpe's proposed findings and recommended partial disposition; granting 3 Plaintiff's Motion for Preliminary Injunction and TRO; and remanding the case to Judge Volpe to hold a temporary injunction hearing and permit defendants to present evidence showing that the Arkansas Department of Correction's beard grooming policy, which restricts Holt's First Amendment right to observe his religion, is the least

		restrictive means of achieving the security goals sought by the policy. Signed by Judge Brian S. Miller on 10/18/11. (hph) (Entered: 10/18/2011)
10/19/2011	30	ORDER granting 12 Plaintiff's Motion to Amend/Correct; granting 27 Plaintiff's Second Motion for Copies; and directing the Clerk of the Court to mail to Plaintiff a copy of the docket sheet and all orders that have been entered in this case. Signed by Magistrate Judge Joe J. Volpe on 10/19/11. (hph) (Entered: 10/19/2011)
11/01/2011	36	Letter from Gregory Holt (pag)(copy mailed) (Entered: 11/03/2011)
11/02/2011	33	ORDER granting 22 Plaintiff's Motion for Service; directing the Clerk of the Court to prepare summons for Defendants Hobbs, Lay, Tate, Robertson, Richardson, and May, directing the U.S. Marshal to serve a copy of the 2 Complaint, 32 Amended Complaint, and summons on Defendants without prepayment of fees and costs or security therefore. Signed by Magistrate Judge Joe J. Volpe on 11/2/2011. (srw) (Entered: 11/02/2011)
11/28/2011	46	ANSWER to 2 Complaint by Ray Hobbs, Gaylon Lay, Larry May, M Richardson, V R Robertson, D W Tate.(Cryer, Christine) (Entered: 11/28/2011)

11/29/2011	47	RESPONSE to Motion re 37 MOTION for Hearing filed by Ray Hobbs, Gaylon Lay, Larry May, M Richardson, V R Robertson, D W Tate. (Cryer, Christine) (Entered: 11/29/2011)
11/29/2011	48	RESPONSE to Motion re 3 MOTION for Preliminary Injunction MOTION for Temporary Restraining Order filed by Ray Hobbs, Gaylon Lay, Larry May, M Richardson, V R Robertson, D W Tate. (Cryer, Christine) (Entered: 11/29/2011)
12/07/2011	57	RESPONSE re 46 Answer to Complaint by Gregory Holt (pag)(copy mailed) (Entered: 12/08/2011)
12/07/2011	58	REPLY to Response to 3 MOTION for Preliminary Injunction MOTION for Temporary Restraining Order filed by Gregory Holt. (pag)(copy mailed) (Entered: 12/08/2011)
12/19/2011	68	DECLARATION of Inmate filed by Gregory Holt. (pag)(copy mailed) (Entered: 12/20/2011)
01/04/2012	73	(This is a TEXT ENTRY ONLY. There is no pdf document associated with this entry.) CLERK'S MINUTE ENTRY for proceedings held before Magistrate Judge Joe J. Volpe: Temporary Injunction Hearing held on 1/4/2012. After hearing testimony from the parties and the admittance of Defendants' exhibits 1-2, the

		hearing concluded. The Court is taking the case under advisement and a recommended disposition will be entered as soon as possible. (Plaintiff: Pro Se; Defense Counsel: Christine Cyer [sic]) (ECRO Stacy Williams) (srw) (Entered: 01/04/2012)
01/04/2012	74	Exhibit and Witness List (srw) (Entered: 01/04/2012)
01/10/2012	79	Letter from Clerk returning exhibits to Attorney Christine Cryer, counsel for Ray Hobbs and other Defendants, of the Temporary Injunction Hearing held on 1/4/21012 [sic]. (srw) (Entered: 01/10/2012)
01/27/2012	82	PROPOSED FINDINGS AND RECOMMENDATIONS recommending the 28 Court's Order granting Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order be VACATED; recommending 3 Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order be DENIED; recommending 2 Plaintiff's Complaint be DISMISSED with prejudice; recommending dismissal of this action constitute a "strike;" and recommending all pending motions be DENIED as moot Objections to R&R due no later than 14 days from the date of this recommendation. Signed by

		Magistrate Judge Joe J. Volpe on 1/27/2012. (srw) (Entered: 01/27/2012)
02/02/2012	85	RECEIPT for Exhibits by Christine Cryer, counsel for all Defendants, from the temporary injunction hearing held on 1/4/2012. (srw) (Entered: 02/03/2012)
02/08/2012	86	OBJECTION to 82 Report and Recommendations by Gregory Holt (pag)(copy mailed) (Entered: 02/08/2012)
02/22/2012	88	DECLARATION of Paul Smisth submitted by Gregory Holt. (pag)(copy mailed) (Entered: 02/22/2012)
03/15/2012	91	EXHIBITS filed by Gregory Holt to 86 Objection to Report and Recommendations. (pag)(copy mailed) (Entered: 03/15/2012)
03/23/2012	93	ORDER adopting proposed findings and recommended disposition; dismissing Holt's complaint with prejudice; dimissal [sic] of this action constitutes a "strike" for purposes of 28 U.S.C. § 1915(g); denying 89 Holt's motion for an emergency hearing; and denying all remaining motion as moot. Signed by Judge Brian S. Miller on 3/23/12. (hph) (Entered: 03/23/2012)
03/23/2012	94	JUDGMENT: Consistent with the order entered today, this case is hereby dismissed with prejudice and

		the relief sought is denied. Signed by Judge Brian S. Miller on 3/23/12. (hph) (Entered: 03/23/2012)
03/27/2012	96	MOTION for Re-Hearing, or in the alternative, Motion for Stay of Order Pending Appeal filed by Gregory Holt (pag)(copy mailed) Modified on 4/9/2012 to correct typographical error(pag). (Entered: 03/27/2012)
04/19/2012	99	ORDER granting 96 Motion for Hearing; granting 98 Motion for Extension of Time. The 3/23/12 Order is stayed pending appeal and Holt has up to and including 14 days from the date of this order to file a notice of appeal. Signed by Judge Brian S. Miller on 4/19/12. (hph) (ORDER IS VACATED PER 136 ORDER). (Entered: 04/19/2012)
06/21/2012	108	MOTION for Order For Review and Application For Permissionn [sic] to File Brief by Gregory Holt (dac) (Entered: 06/21/2012)
07/05/2012	109	RESPONSE in Opposition re 108 MOTION for Order filed by Ray Hobbs, Gaylon Lay, Larry May, M Richardson, V R Robertson, D W Tate. (Attachments: # 1 Exhibit AD Seg documents)(Cryer, Christine) (Entered: 07/05/2012)
07/10/2012	110	REPLY to Response to Motion re 108 MOTION for Review and Application for Permission to file Brief filed by

Gregory Holt. (dac) (Entered: 07/10/2012)

09/13/2012 115 ORDER granting 107 Plaintiff Gregory Holt's motion for leave to appeal in forma pauperis; denying as moot 108 Holt's motion for order; and, denying 111 Holt's motion for relief. Signed by Chief Judge Brian S. Miller on 9/13/2012. (kdr) (Entered: 09/13/2012)

06/12/2013 130 MOTION to Vacate 99 Order on Motion for Hearing, Order on Motion for Extension of Time to File Response/Reply, by Ray Hobbs, Gaylon Lay, Larry May, M Richardson, V R Robertson, D W Tate (Cryer, Christine) (Entered: 06/12/2013)

06/12/2013 131 BRIEF IN SUPPORT re 130 Motion to Vacate filed by Ray Hobbs, Gaylon Lay, Larry May, M Richardson, V R Robertson, D W Tate. (Cryer, Christine) (Entered: 06/12/2013)

06/17/2013 132 RESPONSE to 130 MOTION to Vacate 99 Order on Motion for Hearing, Order on Motion for Extension of Time to File Response/Reply filed by Gregory Holt. (tjb) (Entered: 06/17/2013)

07/24/2013 133 MANDATE of USCA in accordance with the opinion and judgment of 06/12/2013 as to 101 Notice of Appeal filed by Gregory Holt. (mcz) (Entered: 07/24/2013)

07/25/2013	134	MOTION to Continue Injunction Pending Further Appellate Remedies, by Gregory Holt (mcz) (Entered: 07/25/2013)
09/16/2013	136	ORDER granting 130 Defendants' motion to suspend; denying 134 Holt's motion to continue the injunction; and vacating 99 the April 19, 2012 Order. Signed by Chief Judge Brian S. Miller on 9/16/2013. (kdr) (Entered: 09/16/2013)
09/25/2013	137	MOTION for Reconsideration of 136 Order and MOTION to Expedite by Gregory Holt (tjb) (Entered: 09/25/2013)
09/26/2013	138	(This is a TEXT ENTRY ONLY. There is no pdf document associated with this entry.) ORDER denying 137 Motion for Reconsideration; denying 137 Motion to Expedite. Signed by Chief Judge Brian S. Miller on 9/26/13. (sgw) (Entered: 09/26/2013)
10/15/2013	139	Letter from USCA Clerk: The Petition for Writ of Certiorari has been filed with the Supreme Court re: USCA No. 12-3185. (mcz) (Entered: 10/16/2013)
11/20/2013	140	MOTION to Continue Injunctive Relief Pending Petition for Certiorari, by Gregory Holt. (kdr) (Entered: 11/20/2013)

11/21/2013	141	ORDER denying 140 Holt's motion to reinstate injunctive relief for lack of jurisdiction as the matter is currently pending certiorari before the United States Supreme Court. Signed by Chief Judge Brian S. Miller on 11/21/2013. (kdr) (Entered: 11/21/2013)
11/25/2013	142	TRANSCRIPT of Hearing on Motion for Temporary Injunction Proceedings held on January 4, 2012, before Magistrate Judge Joe J. Volpe. Court Recorder – Stacy Williams, Transcription Service – Robin Warbritton. Transcript may be viewed only at the public terminals in the Clerk's office. Copies of transcript are only available through the Official Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. DEADLINES: Notice of Intent to Request Redaction due 12/5/2013. Redaction Request due 12/16/2013. Redacted Transcript Deadline set for 12/26/2013. Release of Transcript Restriction set for 2/24/2014. (plm) (Entered: 11/25/2013)
01/07/2014	143	EXHIBITS by Gregory Holt. (kdr) (Entered: 01/07/2014)

Relevant Docket Entries for the Eighth Circuit Court of Appeals

Gregory Houston Holt,
also known as Abdul Maalik Muhammad

Plaintiff-Appellant

v.

Ray Hobbs, Director, Arkansas Department of Correction; Gaylon Lay, Warden, Cummins Unit, ADC; D W Tate, Captain, Cummins Unit, Arkansas Department of Correction; V. R. Robertson, Major, Cummins Unit, Arkansas Department of Correction; M. Richardson, Sgt., Cummins Unit, Arkansas Department of Correction; Larry May, Chief Deputy Director, Arkansas Department of Correction

Defendants-Appellees

* * *

10/05/2012 MOTION for Transcript at Public Expense, filed by Appellant Mr. Gregory Houston Holt, w/service 10/03/2012. [3961417] [12-3185] (LAB)

10/15/2012 JUDGE ORDER: [3961417-2] The motion for transcript at government expense has been considered by the court and is denied. – Adp Oct 2012 [3963588] [12-3185] (DMS)

* * *

10/25/2012 **BRIEF FILED** – APPELLANT BRIEF filed by Mr. Gregory Houston Holt; w/service by USCA8 on 10/29/2012, FIVE Copies; Length: 18 pages. **Brief of Ray Hobbs, Gaylon Lay, Larry May,**

M. Richardson, V. R. Robertson and D W Tate due on 11/26/2012 [3968879] [12-3185] – [Edited 10/30/2012 by SRD] (DMW)

* * *

12/11/2012 APPELLEE brief of Ray Hobbs, Gaylon Lay, Mr. Larry May, M. Richardson, V. R. Robertson and D W Tate submitted for review. The time for filing the subsequent brief does not begin to run until the brief has been approved and filed. [3983388] [12-3185] (CAC)

12/11/2012 **ADDENDUM** of APPELLEE FILED by Appellees Ray Hobbs, et al.. w/service 12/10/2012 [3983389] [12-3185] (LMT)

12/11/2012 **BRIEF FILED** – APPELLEE BRIEF filed by Ray Hobbs, et al. w/service 12/10/2012, Length: 4414 words **10 COPIES OF PAPER BRIEFS FROM Ray Hobbs due 12/17/2012 WITH revised certificate of service for paper briefs.** [3983468] [12-3185] (Edited to reflect no reply brief due date set at this time. Deadline to be established upon filing of paper appellee brief) – [Edited 12/12/2012 by LMT] (LMT)

* * *

12/26/2012 **BRIEF FILED** – APPELLANT REPLY BRIEF filed by Mr. Gregory Houston Holt. w/service 12/21/2012; 5 copies by USCA-8., Length: 19 pages. [3990349] [12-3185] (MDS)

01/10/2013 RECORD FILED – MISC. RECORD, Location STL, Comments: 1 envelope containing 1 CD of Hearing held on 1/14/2012 [Return to the District Court at end of case], Source Location: USDC / EA [3993152] [12-3185] (STL)

* * *

03/07/2013 **BRIEF FILED**- "SUPPLEMENT TO BRIEF," filed by Pro Se Appellant Mr. Gregory Houston Holt; w/service by USCA8 on 03/07/2013, Length: 2 pages. [4012349] [12-3185] (DMW)

06/06/2013 CASE SUBMITTED Screening Case Submission before Judges Kermit E. Bye, Morris S. Arnold, Bobby E. Shepherd in St. Louis [4043125] [12-3185] (DMW)

06/12/2013 PER CURIAM OPINION FILED – THE COURT: Kermit E. Bye, Morris S. Arnold and Bobby E. Shepherd. – (UNPUBLISHED) – [4044433] [12-3185] (DMW)

06/12/2013 **JUDGMENT FILED** – The judgment of the Originating Court is AFFIRMED in accordance with the opinion. – Scrg Spring 2013 – [4044435] [12-3185] (DMW)

06/25/2013 PETITION for enbanc [sic] rehearing and also for rehearing by panel filed by Pro Se Appellant Mr. Gregory Houston Holt; w/service by USCA8 on 06/26/2013. [4049083] [12-3185] (DMW)

07/17/2013	JUDGE ORDER: [4049083-2] The petition for enbanc [sic] rehearing, filed by Appellant Mr. Gregory Houston Holt, is denied. The petition for panel rehearing is also denied [4049083-3]. – Scrg Spring 2013 [4055622] [12-3185] (DMW)
07/24/2013	MANDATE ISSUED. [4057869] [12-3185] (DMW)
07/26/2013	MOTION to recall the mandate and stay the mandate pending petition for certiorari, filed by Pro Se Appellant Mr. Gregory Houston Holt; w/service by USCA8 on 07/29/2013. [4059118] [12-3185] (DMW)
08/01/2013	JUDGE ORDER: [4059118-2] The motion to recall the mandate and to stay the mandate, filed by Appellant Mr. Gregory Houston Holt, has been considered by the court and is denied. – Scrg Spring 2013 [4060949] [12-3185] (DMW)
	* * *
10/10/2013	U.S. Supreme Court Notice of cert filed in the Supreme Court on 09/27/2013, case No. 13-6827 [4085782] [12-3185] (SRD)
11/14/2013	SUPREME COURT order filed – other. Order filed on 11/14/2013 in case No.13-6827. [4097011] [12-3185] (DMW)

United States District Court
Eastern District of Arkansas
Pine Bluff Division

Gregory Holt #129616
(Abdul Maalik Muhammad),

Plaintiff

vs.

Ray Hobbs, in his official capacity as Director of the Arkansas Department of Correction and Gaylon Lay, in his official capacity as Warden of the Cummins Unit,

Defendants

Complaint

(Filed Jun. 28, 2011)

Civil Action No. 5:11CV00164

I. Jurisdiction and Venue

(1) This is a civil action authorized by 42 U.S.C. Section 2000cc to redress deprivation of his rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA). The Court has jurisdiction under 28 U.S.C. Section 2283 & 2284 and Rule 65 of the Federal Rules of Civil Procedure.

(2) The Eastern District of Arkansas, Pine Bluff Division is an appropriate venue under 28 U.S.C. Section 1391(b)(2) because it is where the events giving rise to the claim occurred.

II. Plaintiffs

(3) Plaintiff, Gregory Houston Holt (aka Abdul Maalik Muhammad) is and was at all times mentioned herein a prisoner of the State of Arkansas in the custody of the Arkansas Department of correction. He is currently confined in the Cummins Unit, in Grady, Arkansas.

III. Defendants

(4) Defendant, Ray Hobbs is the Director of the State of Arkansas Department of Corrections. He is legally responsible for the overall operation of the Department and each institution under its jurisdiction, including the Cummins Unit.

(5) Defendant, Gaylon Lay, is the Warden of the Cummins Unit. He is legally responsible for the operation of Cummins Unit and for the welfare of all the inmates in that prison.

(6) Each defendant is sued in his official capacity.

III(a). Facts

(7) Most of the facts in this case are described in detail in Plaintiff's *Application For Preliminary Injunction and Temporary Restraining Order*. The gist of it is this: The Arkansas Department of Correction has a grooming policy that requires all inmates, regardless of religious belief or practice, to shave with the only exception being that one (1) can wear a mustache that does not extend past the corners of the mouth. The

reasons given for this policy is that inmates will not be able to hide weapons or contraband in facial hair.

(8) Plaintiff is a devout fundamentalist Muslim who follows the Salaf and the Sunnah of the Prophet Muhammad (saws), in which it is stated that one (1) of the characteristics of al-fitrah (the natural way) is that one clip the mustaches short and leave the beard *as it is* (emphasis mine) [Sahih Al-Bukhari, Hadith 7/5893]

(9) The Arkansas Department of Correction practices what is referred to as progressive disciplinary action. That is, once a disciplinary is given, if an inmate refuses to comply with an order to shave, he is given multiple disciplinaries, some as many as several *in one day*. Plaintiff has been subjected to these measures repeatedly until he shaved. He was warned as recently as June 9 that if he persisted in the growing of a ½ inch beard that he would be subjected to those penalties yet again.

(10) Plaintiff is not advocating the unrestricted growth of facial hair. The State does have a legitimate governmental interest in maintaining security for inmates and staff alike and in the staunching of the flow of contraband. Further, the Religious Land Use and Institutionalized Persons Act (RLUIPA) provides that the state must use the "least restrictive means" in allowing religious practice. A ½ inch beard would serve that purpose. There is no legitimate reason why this would be a problem, in that it would be difficult, if not impossible, to hide

weapons or contraband in a beard of that size. Further, case law exists that would buttress Plaintiff's claims. In *Mayweathers vs. Terhune* (328 F.Supp.2d 1086), the Ninth Circuit ruled that a ½ inch beard would serve a legitimate governmental objective in being able to identify inmates in the event of an escape. In that case, the California Department of Corrections (CDC) argued that it was necessary to order inmates to shave so that should they escape, they could not alter their appearance by shaving beards. The Plaintiffs in that case were devout Muslims who were subjected to progressive penalties for refusing to shave. The Court ruled that a ½ inch beard would satisfy the State's interests balanced with the inmates' right to practice their religion in the least restrictive means possible. This case is persuasive authority and should be applied in the instant case given that the facts are almost identical to each other in most respects.

(11) A Declaration is attached to better inform the Court of the workings of the ADC on this matter. Exhibit "A"

(12) Plaintiff would urge the Court to grant him a Temporary Restraining Order (TRO). In order to secure one, Plaintiff must show "irreparable injury, loss, or damage" in order to prevail on a Petition for a TRO. The "injury" does not have to mean *physical* damage to the Body. (*Lewis vs. Casey*, 518 U.S. 343, 1996). Plaintiff only has to show that the injury would be ongoing and imminent. In this case, should Plaintiff not shave, he would be subjected to multiple disciplinaries,

punitive isolation in a cell with temperatures daily in the high 90's, transfer to another penitentiary, and notations in his prison file that could affect ongoing appeals, clemency applications or future parole eligibility. In these respects, the harm is imminent and ongoing and the Court should therefore grant him a TRO.

(13) Plaintiff would urge the Court to grant an injunction with no advance notice to the Defendants for the reasons stated in #12 and that Plaintiff would face retaliation and harassment.

IV Exhaustion of Legal Remedies

(14) Plaintiff, Gregory Holt, used the prisoner grievance procedure available at Cummins Unit to try and solve the problem. On 5-10-11, Plaintiff Gregory Holt presented the facts relating to this complaint. On 5-25-11 or thereabouts, Plaintiff Gregory Holt was sent a response saying that the grievance had been denied. On 5-26-11, he appealed the denial of the grievance to the Chief Deputy Director of the ADC, Larry May. A response was sent back to Plaintiff informing him that a response would be sent by July 8, 2011. Plaintiff would move for an injunction prior to the final response for the reasons stated in #12 & #13. A court is authorized to protect a Plaintiff and issue an injunction even if the administrative remedy process has not been exhausted. (*Jackson vs. District of Columbia*, 254 F.3d 262, 2001). Given the facts presented, Plaintiff is in need of this injunction without first exhausting all remedies. Exhibit "B"

(15) As a final matter, Plaintiff is seeking In forma pauperis status. Plaintiff would ask this Court that he not be required to get verification from the financial officer of the institution due to the fact that should he do so, it would tip off the administration of his plans and would subject him to immediate retaliation.

V. Legal Claims

(16) Plaintiff realleges and incorporates by reference Paragraphs 1-15.

(17) The forcible shaving of the Plaintiff against his religious beliefs violated Plaintiff Gregory Holt's rights and constituted a chill on his rights of religious expression and belief and was not the least restrictive means available to him to practice that belief under the Religious Land Use and Institutionalized Persons Act (RLUIPA) and the First Amendment to the United States Constitution. Further, refusal to allow him to grow a ½ inch beard also violated his rights to free practice of religion under the Act listed.

(18) The plaintiff has no plain, adequate or complete remedy at law to redress the wrongs described herein. Plaintiff has been and will continue to be irreparably injured by the conduct of the defendants unless this court grants the injunctive relief which plaintiff seeks.

VI. Prayer For Relief

(19) Wherefore, plaintiff respectfully prays that this court enter judgment granting plaintiff:

(a) A preliminary and permanent injunction ordering defendants Ray Hobbs and Gaylon Lay to: cease enforcement of the current grooming policy, allow the growing of ½ inch beards, cease the use of progressive punitive measures against those who grow the beard both pending and in the future, expungment [sic] of past disciplinary records against those who refused to shave and banning the transfer for non-disciplinary reason those who seek redress in these matters.

(b) A jury trial on all issues triable by jury.

(c) Any additional relief this court deems just, proper, and equitable.

Respectfully submitted,

/s/ Gregory Holt

Gregory Holt #129616
Cummins Unit
P.O. Box 500
Grady, AR 71644-0500

Verification

I have read the foregoing complaint and hereby verify that the matters alleged therein are true, except as to matters alleged on information and belief, and, as to those, I believe them to be true. I certify under penalty of perjury that the foregoing is true and correct.

Executed at Grady, Arkansas on June 15, 2011.

Gregory Holt
Plaintiff

Exhibit "A"

United States District Court
Eastern District of Arkansas
Pine Bluff Division

Gregory Holt #129616
(AKA Adbul Maalik Muhammad),

Plaintiff

vs.

Ray Hobbs, in his official capacity as Director of the Arkansas Department of Corrections, et al.,

Defendants

Declaration of Robert Hawk

Civil Action No.

Robert Hawk hereby declares:

I have been incarcerated at the Cummins unit since 2003. Since May 6, 2011 I have been in Barracks 14 Cell 430 with Gregory Holt, the Plaintiff.

On June 9, 2011 I observed Correctional Sgt Richardson of the ADC Cummins Unit inform Gregory Holt that he needed to shave. Gregory Holt in turn informed Sgt Richardson that he had federal case law that supported his right to wear a ½ inch beard for Religious purposes and further that he, Gregory Holt, had an Administrative remedy pending in front of Larry May, the Chief Deputy Director of ADC. Sgt Richardson informed Gregory Holt that he, Richardson,

would talk to Captain D.W. Tate, a captain at the Cummins Unit, about Gregory Holt's objections.

On June 11 2011 Sgt Richardson returned to our cell and notified Gregory Holt that he, Sgt Richardson had discussed the matter with Captain Tate. Captain Tate had told Sgt Richardson that if Gregory Holt did not shave, then Sgt Richardson was to take disciplinary action against Gregory Holt. Also that if Sgt Richardson did not write up Gregory Holt then he Sgt Richardson would recieve [sic] disciplinary action. When Gregory Holt informed Sgt Richardson that several "By the Book Lt.'s and Sgt.'s had seen Gregory Holt's facial hair and said nothing about it. Sgt Richardson stated to Mr. Holt that "they must not have wanted to do any paperwork" Mr. Holt initially refused the order but then eventually relented

In my eight years at the Cummins Unit I have seen numerous instances of people refusing to shave being placed in punitive isolation for this act. Also I have witnessed staff members deny inmates chow call, library, visitation, recreation and other such activities due to not being clean shaved.

I declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge. Executed at Grady, Arkansas, on June 16, 2011.

Robert R Hawk
ADC. # 129886
6-16-11: Dated

Exhibit "B"

ACKNOWLEDGEMENT OF GRIEVANCE APPEAL or REJECTION OF APPEAL

TO: Inmate Holt, Gregory H. ADC #: 129616C

FROM: May, Larry D TITLE: Chief Deputy Director

RE: Receipt of Grievance CU-11-00966 DATE: 06/01/2011

Please be advised, the appeal of your grievance dated 05/10/2011 was received in my office on this date 05/25/2011

You will receive communication from this office regarding this Grievance by 07/08/2011

☐ The time allowed for appeal has expired

☐ The matter is non-grievable and does not involve retaliation:

- ☐ (a) Parole and/or Release matter
- ☐ (b) Transfer
- ☐ (c) Job Assignment unrelated to medical restriction
- ☐ (d) Disciplinary matter
- ☐ (e) Matter beyond the Department's control and/or matter of State/Federal law
- ☐ (f) Involves an anticipated event

☐ You did not send all the proper Attachments:

- ☐ (a) Unit Level Grievance Form (Attachment 1)
- ☐ (b) Warden's/Center Supervisor's Decision (Attachment III); or Health Services Response Attached (Attachment IV for Health Issues Only)
- ☐ (c) Did not give reason for disagreement with Response on Attachment III or IV
- ☐ (d) Did not complete Attachment III or IV with your name, ADC#, and/or date
- ☐ (e) Unsanitary form(s) or documents received
- ☐ (f) Other

_____

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

GREGORY HOLT,
ADC # 129616 PLAINTIFF

v. 5:11-cv-00164-BSM-JJV

RAY HOBBS, Director,
Arkansas Department of
Correction; and GAYLON LAY,
Warden, Cummins Unit, Arkansas
Department of Correction DEFENDANTS

PROPOSED FINDINGS
AND RECOMMENDATIONS

INSTRUCTIONS

(Filed Jul. 6, 2011)

The following recommended partial disposition has been sent to United States District Judge Brian S. Miller. Any party may serve and file written objections to this recommendation. Objections should be specific and should include the factual or legal basis for the objection. If the objection is to a factual finding, specifically identify that finding and the evidence that supports your objection. An original and one copy of your objections must be received in the office of the United States District Court Clerk no later than fourteen (14) days from the date of the findings and recommendations. The copy will be furnished to the opposing party. Failure to file timely objections

may result in a waiver of the right to appeal questions of fact.

If you are objecting to the recommendation and also desire to submit new, different, or additional evidence, and to have a new hearing for this purpose before either the District Judge or Magistrate Judge, you must, at the time you file your written objections, include the following:

1. Why the record made before the Magistrate Judge is inadequate.

2. Why the evidence to be proffered at the new hearing (if such a hearing is granted) was not offered at the hearing before the Magistrate Judge.

3. The details of any testimony desired to be introduced at the new hearing in the form of an offer of proof, and a copy, or the original, of any documentary or other non-testimonial evidence desired to be introduced at the new hearing.

From this submission, the District Judge will determine the necessity for an additional evidentiary hearing. Mail your objections and "Statement of Necessity" to:

Clerk, United States District Court
Eastern District of Arkansas
600 West Capitol Avenue, Suite A149
Little Rock, AR 72201-3325

DISPOSITION

I. INTRODUCTION

Plaintiff, Gregory Holt, an inmate in the Arkansas Department of Correction Cummins Unit, filed a *pro se* Complaint (Doc. No. 2) pursuant to 42 U.S.C. § 1983, alleging Defendants are violating his rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA) by requiring him to shave his beard. In conjunction with his Complaint, Plaintiff filed a Motion for Preliminary Injunction and Temporary Restraining Order (Doc. No. 3).

II. PRELIMINARY INJUNCTION

Plaintiff is a fundamentalist Muslim. (Doc. No. 3 at 1). The tenets of Plaintiff's religion prescribes that practitioners "trim the mustache and leave the beard as it is." (Doc. No. 4 at 1). According to Plaintiff, ADC's grooming policy prohibits inmates from wearing beards. (*Id.*). Failure to comply with the grooming policy will result in the inmate being subject to disciplinary action. (Doc. No. 3 at 2). Plaintiff has refused to comply with ADC's grooming policy and is currently under threat of further disciplinary action due to his insistence on maintaining a half-inch beard. (*Id.*). Plaintiff seeks to enjoin the enforcement of ADC's grooming policy and the issuance of disciplinaries against those who choose to grow a beard in violation of ADC's grooming policy.

III. ANALYSIS

In deciding whether to grant injunctive relief, the Court must consider the following factors: (1) the threat of irreparable harm to the movant; (2) the state of balance between the harm and the injury that granting the injunction will inflict on the other party litigants; (3) the probability that the movant will succeed on the merits; and (4) the public interest. *Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (*en banc*). No single factor is dispositive, but the movant must establish a threat of irreparable harm. *Id.* Without a finding of irreparable injury, a preliminary injunction should not be issued. *Randolph v. Rogers*, 170 F.3d 850, 856 (8th Cir. 1999). "The burden of proving that a preliminary injunction should be issued rests entirely with the movant." *Goff v. Harper*, 60 F.3d 518, 520-21 (8th Cir. 1995). The Court in *Goff* also addressed the district court's role in inmate applications for injunctive relief as follows: "[I]n the prison context, a request for injunctive relief must always be viewed with great caution because 'judicial restraint is especially called for in dealing with the complex and intractable problems of prison administration' [t]he courts should not get involved unless either a constitutional violation has already occurred or the threat of such a violation is both real and immediate." *Id.* (quoting *Rogers v. Scurr*, 676 F.2d 1211, 1214 (8th Cir. 1982)).

In *Fegans v. Norris*, 537 F.3d 897 (8th Cir. 2008), a male inmate argued that ADC's grooming policy prohibiting inmates from wearing uncut beards

violated RLUIPA. The United States Court of Appeals for the Eighth Circuit held that ADC's grooming policy does not violate RLUIPA. *Id.* at 906. The court specifically found that the ADC had a legitimate penological interest in prohibiting inmates from wearing uncut beards and that the prohibition was the least restrictive means available in furthering that interest. *Id.* at 907. In light of *Fegans*, this Court finds that Plaintiff has little likelihood of success on the merits and that his Motion for Preliminary Injunction and Temporary Restraining Order (Doc. No. 3) should be DENIED.

IV. CONCLUSION

IT IS THEREFORE RECOMMENDED THAT:

1. Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order (Doc. No. 3) should be DENIED.

DATED this 6th day of July, 2011.

/s/ J. J. Volpe
JOE J. VOLPE
UNITED STATES
MAGISTRATE JUDGE

United States District Court
Eastern District of Arkansas
Pine Bluff Division

Gregory Holt, #129616

Plaintiff

vs.

Civil Action No.
5:11-CV-00164-BSM-JVV [sic]

Ray Hobbs, et al.,

Defendants

Motion For Leave To Amend

(Filed Jul. 21, 2011)

Comes now the Plaintiff, pro se, and for his Motion states the following:

(1) Plaintiff's suit currently has two (2) Defendants, Ray Hobbs and Gaylon Lay.

(2) Based on recent events regarding matters pertinent to the case, Plaintiff seeks to amend his suit to include the following Defendants:

[A] Captain D.W. Tate, in his official capacity as Segregation Captain at the Cummins Unit

[B] Major V.R. Robertson, in his official capacity as Major at the Cummins Unit

[C] Sgt. M. Richardson, in his official capacity as Sergeant at the Cummins Unit

(3) Plaintiff also seeks to add the following to the suit as Plaintiffs:

[A] the statement after Gregory Holt to include

"on behalf of himself and all others similarly situated."

(4) Plaintiff would also seek to add Larry May, in his official capacity as Chief Deputy Director of the Arkansas Department of Correction as a Defendant.

Wherefore, premises considered, Plaintiff prays that this Court grants his Motion.

Respectfully,

/s/ Gregory Holt

Gregory Holt #129616
Cummins Unit
P.O. Box 500
Grady, AR 71644-0500

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF ARKANSAS PINE BLUFF DIVISION**

**GREGORY HOLT,
ADC #129616** **PLAINTIFF**

v. **CASE NO. 5:11CV00164 BSM/JJV**

**RAY HOBBS, Director,
Arkansas Department of
Correction, et al.** **DEFENDANTS**

ORDER

(Filed Oct. 18, 2011)

The proposed findings and recommended partial disposition [Doc. No. 7] submitted by United States Magistrate Judge Joe J. Volpe and the filed objections [Doc. No. 10] have been reviewed. After carefully considering these documents and making a *de novo* review of the record, it is concluded that the proposed findings and recommended partial disposition should be, and hereby are, rejected in their entirety in all respects. Defendants have not met their "burden of demonstrating that the grooming policy is the least restrictive means to achieve security as *applied* to" plaintiff Gregory Holt. *Fegans v. Norris,* 537 F.3d 897, 908-09 (8th Cir. 2008) (Melloy, J., dissenting).

IT IS THEREFORE ORDERED that:

1. Plaintiff's motion for preliminary injunction and temporary restraining order [Doc. No. 3] is GRANTED.

2. The case is remanded to Judge Volpe to hold a temporary injunction hearing and permit defendants to present evidence showing that the Arkansas Department of Correction's beard grooming policy, which restricts Holt's First Amendment right to observe his religion, is the least restrictive means of achieving the security goals sought by the policy.

Dated this 18th day of October 2011.

/s/ Brian S. Miller
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

GREGORY HOLT,
ADC # 129616 PLAINTIFF

v. 5: 11-cv-00164-BSM-JJV

RAY HOBBS, Director,
Arkansas Department of Correction;
and GAYLON LAY, Warden,
Cummins Unit, Arkansas
Department of Correction DEFENDANTS

ORDER

(Filed Oct. 19, 2011)

Plaintiff's Motion for Leave to Amend/Correct Complaint (Doc. No. 12) and Second Motion for Copies (Doc. No. 27) are GRANTED. The Clerk of the Court is directed to mail to Plaintiff a copy of the docket sheet and all orders that have been entered in this case.

IT IS SO ORDERED this 19th day of October, 2011.

/s/ J J Volpe
JOE J. VOLPE
UNITED STATES
MAGISTRATE JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF ARKANSAS PINE BLUFF DIVISION**

**GREGORY HOLT
ADC # 129616** **PLAINTIFF**

vs **NO. 5:11-CV-00164-BSM-JJV**

**RAY HOBBS, LARRY MAY,
GAYLON LAY, DONALD TATE,
VERNON ROBERTSON,
MICHAEL RICHARDSON** **DEFENDANTS**

ANSWER

(Filed Nov. 28, 2011)

Come now the ADC Defendants Ray Hobbs, Gaylon Lay, Donald Tate, Vernon Robertson, Michael Richardson, and Larry May, defendants, by and through their counsel, Attorney General Dustin McDaniel, and Assistant Attorney General Christine A. Cryer, and for their Answer to the Amended Complaint state the following:

1. Defendants deny jurisdiction as written in paragraph (1) of the Complaint and deny that the injunctive relief sought is appropriate.

2. Defendants deny venue is proper.

3. Defendants admit paragraph (3).

4. Defendants admit that Defendant Ray Hobbs is the Director of the ADC, but deny liability and all other allegations found in paragraph (4).

5. Defendants admit that Defendant Gaylon Lay is the Warden at the Cummins Unit, ADC, but deny liability and all other allegations found in paragraph (5).

6. Paragraph (6) of the Complaint speaks for itself. As to all persons Plaintiff sought to amend this suit to include as Defendants in his Motion for Leave to Amend (DE 12), Defendants state that all Defendants are correctly identified as employees of the ADC. Liability is denied as to each. To the extent that Plaintiff attempts to add unnamed plaintiffs or seek class certification in this action, Defendants deny and/or object.

7. Defendants state that the pleading referenced in paragraph (7) of the Complaint speaks for itself. Defendants admit that certain ADC policies pertain to inmate grooming and hygiene, but are without sufficient information to provide a response to the remaining allegations in paragraph (7) and, accordingly, deny the same.

8. Defendants are without sufficient information to provide a response to the allegations in paragraph (8) and, accordingly, deny the same.

9. Defendants deny paragraph (9) as it is written.

10. Defendants state that the case law and legislation cited in paragraph (10) speak for themselves. To the extent that Plaintiff asserts that the State legitimately regulates inmate grooming as part of its effort to ensure the security of all persons at ADC, Defendants admit the same. Defendants deny all other statements, allegations, characterizations, or conclusions of law found in paragraph (10).

11. Defendants deny the allegations in the Declaration attached to the Complaint as Exhibit A.

12. Defendants deny that a temporary restraining order (TRO) is warranted in this case, as requested in paragraph 12 of the Complaint.

13. Defendants deny that notice of Plaintiff's application for an injunction or TRO would result in retaliation or harassment, as requested in paragraph 13 of the Complaint.

14. Defendants state that all referenced grievances, exhibits, and/or case law speak for themselves. Defendants deny that Plaintiff exhausted all available remedies and deny that Plaintiff's allegations warrant waiver of any exhaustion requirements, as alleged in paragraph 14 of the Complaint.

15. Defendants deny Plaintiff's entitlement to IFP status, and deny allegations of a potential for retaliation as found in paragraph (15).

16. Defendants deny paragraph (16).

17. Defendants deny any allegations of Constitutional violations and all other allegations found in paragraph (17).

18. Defendants deny harm to the Plaintiff and deny all other allegations found in paragraph (18).

19. Defendants deny Plaintiff has stated a claim for which relief may be granted and deny that injunctive relief is appropriate. Defendants deny that Plaintiff is entitled to relief as prayed in paragraph (19).

20. Defendants deny each and every allegation not specifically admitted to herein.

AFFIRMATIVE DEFENSES

In addition to the averments pleaded above, Defendants affirmatively plead the following:

1. Affirmatively pleading, Defendants state that the Complaint fails to state a claim upon which relief can be granted.

2. Affirmatively pleading, Defendants state that this Court lacks subject matter jurisdiction over this action.

3. Affirmatively pleading, Defendants state that venue is not proper.

4. Affirmatively pleading, Defendants state that service of the Complaint was improper.

5. Affirmatively pleading, Defendants state that Plaintiff's claims are barred by the doctrines of *res judicata* and collateral estoppel.

6. Affirmatively pleading, Defendants state that Plaintiff's claims are barred by the doctrine of laches.

7. Affirmatively pleading, Defendants state that Plaintiff's claims are time-barred by the applicable statute of limitations.

8. Affirmatively pleading, Defendants state that any claim for injunctive relief is barred by the Clean Hands doctrine.

9. Affirmatively pleading, Defendants state that they are entitled to sovereign immunity for any official capacity claims for money damages, should any future amendments seek monetary relief.

10. Affirmatively pleading, Defendants state that they are entitled to qualified immunity for any individual capacity claims for money damages, should any future amendments seek monetary relief.

11. Affirmatively pleading, Defendants state that *respondeat superior* is not a permissible theory for recovery in § 1983 actions

12. Affirmatively pleading, Defendants state that Plaintiff failed to exhaust all administrative remedies pursuant the Prison Litigation Reform Act.

13. Defendants reserve the right to file an amended answer or any other appropriate pleading

and to allege any additional affirmative defenses that might be available to them.

WHEREFORE, Defendants Ray Hobbs, Gaylon Lay, Donald Tate, Vernon Robertson, Michael Richardson and Larry May, respectfully request Plaintiff's Complaint be dismissed, with prejudice, and for any and all other just and proper relief to which they may be entitled be granted.

Respectfully submitted,

DUSTIN MCDANIEL

Attorney General

By: /s/ Christine A. Cryer

Arkansas Bar No. 2001082
Assistant Attorney General
323 Center Street, Suite 200
Little Rock, Arkansas 72201
Phone: (501) 683-0958
Fax: (501) 682-2591
chrisline.cryer@arkansasag.gov

[Certificate Of Service Omitted In Printing]

United States District Court
Eastern District of Arkansas
Pine Bluff Division

Gregory Holt #129616 et. al., Plaintiffs

vs.

Ray Hobbs, et. al., Defendants

Case No. 5:11CV164-BSM-JJV

Reply to Defendants' Response To Complaint

(Filed Dec. 7, 2011)

Comes now the Plaintiff, Gregory Holt, and for his Motion or Reply states the following:

(1) The Arkansas Department of Correction receives federal funding as do all Department of Corrections and the Religious Land Use and Institutionalized Persons Act (RLUIPA) covers this, placing the matter squarely within this Court's jurisdiction. Further, Section 1331 and 1343(a)(3) of 28 United States Code confers jurisdiction on the Court and Sections 2283 and 2284 of the same Title confers jurisdiction on the Court to grant injunctive relief as well as Rule 65 of the Federal Rules of Civil Procedure.

(2) Venue has already been established, given that since Plaintiff is housed in Lincoln County, the Pine Bluff Division is the appropriate venue.

(3) Defendants have failed to show how Ray Hobbs is immune to liability and how he is

not responsible for the operation of the ADC and each institution under its jurisdiction.

(4) Defendants have failed to show how Gaylon Lay is not responsible for the operation of the Cummins Unit or that he is not responsible for the welfare of the inmates housed there.

(5) Defendants have failed to show how they are not liable as to the allegations made in the Complaint. A Motion is pending in this Court seeking to add several individuals as Plaintiffs (Doc. 4[illegible]) The Court has already entered an Order on October 19, granting Plaintiff class certification (Doc. 30) The Defendants have failed to state or show their specific objections to Plaintiffs being added or class certification.

(6) Plaintiff is unsure whether Defendants are disputing that the ADC has a grooming policy requiring inmates to shave everything but a mustache that cannot extend past the corners of the mouth, so Plaintiff points to the ADC Handbook on page 8 under "Grooming Policy" which states just that.

(7) Plaintiff refers back to the Hadith that he quoted in the Complaint regarding a Muslim's obligation to grow his lihyat (beard) in response to the Defendant's point 8.

(8) Plaintiff can provide proof that the ADC practices progressive penalties by the disciplinaries that he received in this case. (See also Exhibit "A")

(9) Defendants have failed to show that a ½ inch beard would compromise the security interests of the ADC in that it would be nearly impossible to hide anything in a beard of that length, and the supporting case law Plaintiff relied on is sufficient to establish the veracity of his claim.

(10) The Declaration that was filed supports Plaintiff's claims as well as the additional Declarations that were filed. They show a pattern of how the ADC uses this oppressive policy to harass the inmate population.

(11) Plaintiff met the burden of proof in order to secure a Temporary Restraining Order (TRO) in that the Court found that the ADC's grooming policy was not the least restrictive means to achieve security as applied to the Plaintiff, a TRO is a continuing necessity in order to prevent the Defendants from harassing the Plaintiff or subjecting him to the draconian penalties that the ADC imposes or to prevent the ADC from transferring him for non-disciplinary reasons, a tactic the ADC routinely uses to disrupt litigation efforts.

(12) As an additional point to the one (1) above, Plaintiff would most certainly face retaliation if a TRO does not remain in effect. Plaintiff is being harassed even with the injunction in place, as has been documented in correspondence to the Court. Plaintiff has been effectively barred from eating breakfast due to the fact that the night shift refuses to

recognize the validity of the Court's order and clearly stated that the Order "is just an order" and doesn't say specifically that I don't have to shave. Further, Plaintiff's legal mail is being held or not delivered as well as some pieces of personal mail. Plaintiff asserts that some strengthening of the order is necessary in order to force compliance.

(13) Plaintiff has exhausted his administrative remedies, as defined by ADC policy, and the PLRA.

(14) The Court has already granted IFP status to the Plaintiff who has shown that he clearly is entitled to that.

(15) Plaintiff has shown a viable, cognizable claim.

(16) Defendants have failed to show how service of the Complaint was improper.

(17) Plaintiff has shown irreparable harm as defined by case law and was enough to convince the Court to grant a TRO. Further, Plaintiff has shown how he and others would be harmed.

(18) Plaintiff states that the issue of whether a ½ inch beard would be a security threat has never been litigated in Arkansas.

(19) Defendants have failed to show that the Plaintiff's claims are the result of laziness or purposeful delay and have not shown prejudice.

(20) Defendants have failed to show that this action was brought in bad faith.

(21) Plaintiff has not filed a 1983 action. Plaintiff can seek relief under the RLUIPA for deprivation of rights.

(22) As stated previously, Plaintiff has exhausted his administrative remedies.

(23) The Complaint falls well within the statute of limitations as defined in Title 28 U.S.C. Section 1658.

(24) Defendants have failed to show that a ½ inch beard poses a security risk thereby leaving the allegations uncontroverted.

For the foregoing reasons, Plaintiff moves that the relief be quested by the Defendants be denied in all respects, that the injunction be continued, this case to proceed and for all other relief to which he may be entitled.

Respectfully submitted,

/s/ Gregory Holt

Gregory Holt #129616
(Abdul Maalik Muhammad)

[Certificate Of Service Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

GREGORY HOLT,	:	Docket No. 5:11-CV-
A.K.A. ABDUL MAALIK MUHAMMAD,	:	00164-BSM
PLAINTIFF,	:	Little Rock, Arkansas
VS.	:	January 4, 2012
RAY HOBBS, ET AL,	:	9:57 A.M.
DEFENDANTS.	:	

TRANSCRIPT OF HEARING ON MOTION
FOR TEMPORARY INJUNCTION
BEFORE THE HONORABLE JOE J. VOLPE
UNITED STATES MAGISTRATE JUDGE

[2] APPEARANCES:

For the Plaintiff:
Mr. Gregory Holt, Pro Se
A.K.A. Abdul Maalik Muhammad
ADC # 129616
Cummins Unit
Post Office Box 500
Grady, AR 71644-0500

For the Defendants:
Ms. Christine A. Cryer
Arkansas Attorney General's Office
Catlett-Prien Tower Building
323 Center Street

Suite 200
Little Rock, AR 72201-2610

[3] INDEX

	DIRECT	CROSS	REDIRECT	RECROSS	PRESIDING OFFICIAL
WITNESS FOR PLAINTIFF:					
Gregory Holt, a.k.a. Abdul Maalik Muhammad	7	14			
WITNESSES FOR DEFENSE:					
Gaylon Lay	32	45	63	63	61
Grant Harris	64	72	76,80	80	77

EXHIBITS:	IDENTIFIED	RECEIVED
Defense Exhibit No. 1	71	71

[4] PROCEEDINGS

(Call to order of the Court.)

THE COURT: Good morning. We are here in the matter of *Gregory Holt also known as Abdul Malik* [sic] *Muhammad v. Ray Hobbs,* director of Arkansas Department of Correction, and others. This is case 5:11-CV-164. And we are here for a hearing on the motion for a temporary injunction filed by – do you go by Mr. Muhammad?

THE PLAINTIFF: Yes, sir.

THE COURT: All right. Filed by Mr. Muhammad in this case. Initially, I had looked at the motion and looked also at the Eighth Circuit precedent in *Fegans v. Norris,* and I thought that it should be denied. Judge Miller looked at it and sent it back to me. And having a second look at it, I think Judge Miller is right, that it requires an individual and particular analysis on the motion. So I was incorrect, and denied it based on not hearing any other facts than what was pled and comparing it to the case in *Fegans.* So I set it for a hearing, and here we are. And welcome. Thanks to our Arkansas Department of Correction transportation folks always getting everybody here on time, on target, we appreciate it so much.

And I guess it's your motion, Mr. Holt.

Ms. Cryer, will you tell me who is at the table with you? I see Mr. Hobbs, is that –

[5] MS. CRYER: Actually, Your Honor, Mr. Hobbs is not here. I have Warden Gaylon Lay from the Cummins Unit.

THE COURT: Okay. Warden.

MS. CRYER: I have Assistant Director Grant Harris with the Department of Correction. Mr. Hobbs is not here today.

THE COURT: And I'm sorry, I thought – I had recognized Mr. Lay – or Warden Lay from another hearing a while ago, it's been a while since I've seen you all. But, welcome, thank you.

Do you have any witnesses, Ms. Cryer?

MS. CRYER: Your Honor, I do have a number of other individuals who are here. I do not know whether they will be called to testify or not. But I can go ahead and identify them for the record if you would like for me to do so.

THE COURT: Sure. Why don't you do that, please.

MS. CRYER: Okay. We have Deputy Warden Andrea Weekly from the Cummins Unit. I'm sorry, I'm trying to sit down so you can see.

THE COURT: Sure. That will be fine. Thank you.

MS. CRYER: We have Chaplain Wilson Bates from the Cummins Unit.

THE COURT: Chaplain.

MS. CRYER: We have Chaplain John Wheeler, who is the head chaplain, am I –

[6] MR. WHEELER: Administrative.

MS. CRYER: Okay. Administrative for the Department of Correction. And we also have Chaplain Amin, who is the Islamic coordinator for the Department of Correction.

THE COURT: All right. Very good.

And, Mr. Muhammad, did you have any witnesses at this time or that you plan to present?

THE PLAINTIFF: No, sir.

THE COURT: All right. Well, very good. I mean, Mr. Muhammad, I've read your pleadings and your motion and, at this point in time, it's your obligation to kind of move forward, if you will, and tell me a little bit about your claim. Give me some facts on your request with the Department of Correction with regard to your exemption and just kind of lay some foundation. Ultimately, it's going to be, I believe, up to the defense to provide a reasonable basis for denying the exemption. But I want you to go ahead and lay out your facts for the record, if you would.

THE PLAINTIFF: Do you want me to come to the lectern or just –

THE COURT: It's whatever is your pleasure. You have a bunch of documents there. Do you need to refer to your documents?

THE PLAINTIFF: I have the ones – the main ones that I intend to refer to, I've already pulled them out of the file [7] along with some stuff from the Koran that details to help you get a better understanding of where I'm coming from on this particular motion here.

THE COURT: Well, why don't you come forward then, sir. If you want, why don't you come – you can have a seat here.

THE PLAINTIFF: Okay.

THE COURT: Since you're going to be a testifying witness, and I'll put you under oath as well.

GREGORY HOLT, A.K.A. ABDUL MAALIK MUHAMMAD, PLAINTIFF HEREIN, SWORN.

DIRECT EXAMINATION

BY THE COURT:

Q All right. Mr. Muhammad, tell me how old are you, sir?

A 36.

Q And where did you grow up?

A Little Rock.

Q And how long have you been incarcerated?

A This time, I've been locked up two years.

Q Two years. What kind of sentence are you serving?

A Life, plus 40.

Q And what was the conviction?

A Aggravated residential burglary and domestic battery, first degree.

Q Out of Pulaski County?

[8] A Yes, sir.

Q All right. And what unit are you presently in?

A Cummins Unit.

Q And tell me what led to the filing of your complaint and then your motion?

A As a – I'm what's called a Saliba's Muslim. Okay. I believe in following the Sabbath of the Prophet Muhammad, which is the way of the Prophet Sunnah, things of that nature. And one of the areas of the Sunnah that's addressed by the Prophet Muhammad, sallallahu alayhi wa sallam, or peace be upon him, is that one of the characteristics of a Muslim or Al-Fitra is to keep the mustaches short and leave the beard as it is. As I pointed out in my memorandum of law, I believe it's in this – in the complaint itself, I referred to a Hadith known as Sahih Al-Bukhari. Sahih Al-Bukhari is one of the leading collections of Hadith in the Muslim world. It's recognized as a sound Hadith, which is the sayings or the works or the practices the Prophet Muhammad, how he – how he did things, and it was narrated by companions who were with him or who were considered legitimate sources of information as it relates to the way the Prophet Muhammad did things. And then Sahih Al-Bukhari, Hadith 7 – or Volume 7, Hadith No. 5893, the Prophet Muhammad there laid out that there are several characteristics of Al-Fitra. Some of those characteristics are you shave the underarm hair, you shave the [9] pubic hair, you clip the nails, but you also clip mustaches short, leave the beard as it is.

When I came to the department of – Arkansas Department of Correction, I wasn't aware of what their grooming policy was until I came to Diagnostic. When I got to Diagnostic, I found that you could only have a mustache that does not extend past the corners of the mouth. At that point, I informed that – the correctional staff there that as a – as a devout Muslim, that it was my belief that you should grow your beard out. I was informed that if I didn't comply, I would be given – and shave, I would be given disciplinaries. I did receive several disciplinaries. And after I saw how the Department of Correction practices their penalties, which is called progressive penalties, which they can come and give one – one officer can give you an order to shave, and then if you refuse, he'll get you – write you a disciplinary, another officer can come right behind him, give you an order to shave, and if you refuse to shave, he can write you a disciplinary, and it can go on and on to the point that you're in the hole – in the hole a year, two years, three years. So, at that point, I saw really there was no way out but to go ahead, as much as I hated to, and to shave and violate my beliefs.

I was doing some legal research this past year, in 2011, on some cases from other circuits where the grooming policy had been challenged, and I came across one out of the Ninth [10] Circuit, the *Mayweathers* case, in which the Muslims in the Department of Correction in California sued over the very same thing that the ADC practices. In fact, the California Department of Correction practices some of

the exact same things that the Arkansas Department Correction does. In that particular case, the brothers there argued for a half inch beard. So what I did was, I went ahead and filed through the Administrative Remedy process at Cummins Unit, I filed a grievance asking for that the grooming policy be set aside and that I be given a religious exception exemption to the grooming policy.

Warden Lay – Warden Lay refused. His response was that it was the Department of Correction's policy that the reason that they don't allow you to grow any facial hair other than a mustache is because you could hide contraband or weapons in the facial hair. And my argument to that is that with a half inch beard, you can't hide anything at all in the facial hair. You can hide it more easily in the head hair. As you can you see here, I could easily hide a weapon of some kind in the head hair, but the Department of Correction doesn't require you to shave your head. Their policy on the head hair is that you can only grow the sideburns, they can't go past the middle of the earlobe, and it can't go past the middle of the nape of the neck. Other than that, they don't have a policy as to how thick it can be on the top. In fact, it is a common practice [11] at the Cummins Unit to transport weapons and contraband in the head hair. I know this for a fact.

So after the policy – after my grievance was denied all the way up to Mr. Larry May, I filed this action basing it on the *Mayweathers* case out of California.

The issue is, is whether or not a half inch beard would be able to be – you'd be able to hide anything in it. I am not pushing for an unrestricted beard growth. I am not challenging the hair – the head hair policy. All I'm asking is that I be allowed to grow a half inch beard based on my religious beliefs, because it would – it would contribute to the safety and good order of the institution, it would not be a threat to the institution because I've been walking in the hallways up until recently with a half inch beard on my face and there hasn't been any problems. I don't foresee any – I don't see how there could be any problems now with allowing me to continue to grow it at this rate, which is getting close to a half inch, and allow me to do that based on my religious beliefs.

Q What's the policy now, is it a quarter inch?

A They – the policy still is that they can only grow a mustache that cannot extend past the corners of the mouth. They allow for dermatological reasons, if you have a skin condition, they allow you to grow up to a quarter inch beard and then use the clippers to shave it after it gets – it gets [12] to a quarter inch length.

Now, my argument on that is, is that if – if a quarter inch beard does not pose a security threat, I don't understand how a half inch beard could.

One is for dermatological reasons. One is for religious reasons. But I don't understand how it could be a security threat, because you cannot hide anything in this, you can see everything on the face.

Q You have a beard. What's the current – how are you able to have a beard right now?

A I was allowed to based on the restraining order that – or the injunction that Judge Miller entered.

Q Okay.

A I made an agreement with Warner – Warden Warner and Major Robertson because they asked me how long are you going to let it grow, I said because I had asked for a half inch, I was going to keep at a half inch, and that's what I have strived to do at this point.

Q All right. All right. Do you have anything further? I mean, that pretty well lays out what I need to know. Do you have anything further to add?

A Well, there is one thing, because I know in the Muslim world, it is not – not every Muslim believes that it is a requirement that you grow the beard, and some Muslims believe that the Hadiths as it relates to the Prophet are only [13] advisory or something that you can choose to do if you want to. But I turn your attention in the Koran to Surah 4, Ayah 80, and in that particular Ayah, it says [indiscernible], he who obeys the messenger Muhammad, sallallahu alayhi wa sallam, has indeed obeyed Allah, but he who turns away, then we have not sent you Muhammad, sallallahu alayhi wa sallam, as a watcher over them. Which in that statement there, in that particular Ayah, it refers to the fact that something

that the Prophet Muhammad did, that Muslims should do, and if the Prophet Muhammad said to do it, if you don't do it, you're disobeying Muhammad and therefore you're disobeying Allah [indiscernible] Allah.

THE COURT: And I don't think there is any burden on you to prove under RLUIPA that – I mean, I don't think you have any burden of proving your religious needs, I don't think. Am I correct on that, Ms. Cryer? I think RLUIPA is pretty wide open, is it not?

MS. CRYER: It is, Your Honor, and because there is no mechanism for us to really challenge whether or not his belief is sincerely held, we're not standing here today challenging whether or not he believes, you know, in the various prophets or whether or not he follows the Koran.

THE COURT: Okay. And like I said, I don't think the law impedes that on him either. So that's fine, Mr. Muhammad, your point is well taken, but there's no burden on you to [14] prove that.

All right. Now I bet Ms. Cryer has some questions of you and I'll allow her to cross examine you unless you have anything further that you wanted to add.

THE PLAINTIFF: I don't at this point.

THE COURT: Okay. Thank you, sir.

MS. CRYER: Thank you, Your Honor.

CROSS EXAMINATION

BY MS. CRYER:

Q Mr. Holt, I may jump around a little bit, and I apologize if I do. And I also apologize for calling you Mr. Holt if I'm to call you Mr. Muhammad. Okay. Let me ask – and again, I may skip around a little bit, the *Mayweathers* case that you are referring to is out of the Ninth Circuit case and was that a 2004 case?

A Yes, ma'am.

Q Okay. Now you entered the Department of Correction in July of 2010; is that correct?

A Yes, ma'am.

Q All right. Had you ever been incarcerated in the department of – Arkansas Department of Correction before that date?

A Not physically incarcerated. I had state time that was run concurrent with fed time.

Q All right. But this was your – July 2010 was your first [15] time actually entering the facilities of the Arkansas Department of Correction?

A Yes, ma'am.

Q All right. Now, let me ask, with regard to practicing your religious beliefs, there are other ways that you are entitled and allowed to practice your religion, correct?

A At Cummins Unit?

Q Yes.

A It's very limited.

Q Okay. You can pray, correct?

A I can pray.

Q Okay. You have a Koran, correct?

A Yes, ma'am.

Q Okay. And, in fact, you've had the Koran since you left the Diagnostic Unit and were transferred to the Cummins Unit in July of 2010, correct?

A Yes, ma'am.

Q Okay. You are allowed to request books or religious materials from various distributors, correct?

A No, ma'am.

Q Okay. You're not allowed to request books or materials at all from any type of distributor?

A I had to go through a grievance process just to get some books, because the chaplain tried to tell me that they didn't have any Islamic books and I wrote a grievance and a sergeant [16] went down there and came back with a big stack of Islamic books.

Q Okay. You were provided a mailing address of a distributor in New York by Chaplain Banks earlier this year, correct?

A For the purposes of getting a Koran, yes, ma'am.

Q Okay. You're able to request a pork free meal, correct?

A Yes.

Q Okay. You are able to observe the religious holidays that you choose, correct?

A That's correct.

Q Okay. You're able to participate in Ramadan?

A Yes, ma'am.

Q All right. You are able to or entitled to have a spiritual advisor, correct?

A Yes, but I don't get access to them.

Q Okay. You are – can you correspond with one if you have a spiritual advisor?

A I've attempted to. My correspondence is not answered.

Q Okay. You were able to seek a name change in the Pulaski County Circuit Court, correct?

A Yes, ma'am.

Q All right. And you are also in possession or have been in possession of a prayer rug, correct?

A Yes, ma'am.

[17] Q Okay. So, would you now agree with me that there are ways, other than observing whether or not you are going to shave your beard, that you are entitled and allowed to participate in various forms of adhering to and participating in your religion?

A That's correct, but I want to add – I want to add that those things alone – you have to do everything with a totality of the circumstances. If the Prophet Muhammad commanded that a Muslim is to clip his mustache short and leave the beard as it is, it is incumbent upon a Muslim to do that. If he fails to do that, it is my belief, and according to the Koran, that he is disobeying the Prophet Muhammad, sallallahu alayhi wa sallam, and he's also disobeying Allah [indiscernible] Allah.

Q Okay. You would agree with me that that is your interpretation, correct?

A No, that is not my interpretation. That's Hadith.

Q Okay.

A That – that is sound Hadith. That's why I put that in this complaint and keep referring to it is because of the fact that it is sound Hadith. The Hadith is important to follow because we are to emulate the Prophet Muhammad, sallallahu alayhi wa sallam, as much as possible. And if the Prophet Muhammad said to do it, we are to do it. The Hadith says so. The Hadith is sound. And I – and I try to strive to emulate [18] the Prophet.

Q How long have you been of the Muslim faith?

A Nine years, going on ten.

Q And when you were charged with the most recent crimes that you entered the Department of Correction for, were you a practicing Muslim?

A Yes, ma'am.

Q Okay. And I believe in your pleadings that you have acknowledged that the Arkansas Department of Correction has a legitimate penological interest with regard to having a grooming policy, correct?

A Yes.

Q Okay. You just disagree with whether or not it should apply to you and whether or not you should be limited with the length of your beard, correct?

A I'm going to put it like this to you, I want to be protected, too, because I'm an inmate in the Department of Correction. There are other -- there are other ways that people hide weapons on them. The facial hair alone is – is not where people most of the time are going to hide weapons.

Q That's because they're not allowed to grow facial hair, correct?

A That's correct.

Q Okay.

A But they could hide them someplace else. They could hide [19] them on the clothes, you know, that type of thing. Having a half inch beard – having a half inch beard, again the issue is whether a half inch beard is going to cause a security concern in the Department of Correction. I have proven by walking the halls of Cummins Unit for almost three months with a half inch beard that there is no security concern. There has been no – been no issues, as far as I know, complaints, other than staff not liking the fact that I have a beard. Other than that, there has been nothing on my end for having done anything like that.

Q Okay. So your position is that because you have chosen not to hide any – or attempt to anything in your beard, that is not – it does not create a security concern?

A A half inch beard would not create a security concern. More than one court has ruled on that.

Q Where did you come up with the half inch requirement?

A From –

Q And I ask this because in your memorandum of law you say that your belief is that you should leave the beard as it is.

A That's correct.

Q So I'm trying to figure out how do you justify now coming up with a half inch beard? Is it because –

A As –

Q – of the Ninth Circuit case law?

A As – as the Prophet Muhammad again has stated in the [20] Hadith that for every travail there is two escapes, if – if you are in a position – if a Muslim in a position where the lesser of two evils are involved, it is permissible to go with the lesser of that evil. If the evil requires that you observe – to a certain extent if you are observing the – the – with your intention, which is called your niyyah, to grow the beard, if it is your intention to leave it uncut, then according to the Hadith, the 40 Hadith Qudsi, it states that – that if you intend to do a good deed, but don't do it, it's still credit to you as a good deed. So if I have – to a certain point here, have made an effort to comply with the dictates of the Prophet Muhammad, sallallahu alayhi wa sallam, then I have done what I'm supposed to do. And, yes, the half inch beard did – did come in to play in that Ninth Circuit case.

Q Okay. So you arrived at the half inch beard requirement based upon the Ninth Circuit case?

A Because it seemed reasonable, yes.

Q Okay. And I believe that you also just said that based upon your – based upon your beliefs, that if you try to do the right thing, but are not allowed to do it, that that's still acceptable, correct?

A That's correct.

Q Okay. So if you tried to grow a beard of any length, and the Department of Correction said no, as far as your religious [21] beliefs go you're still okay because you attempted to comply with that, but you were stopped by the laws of the Department of Correction?

A If it was under compulsion, to a certain extent, yes.

Q Okay. Now when you filed your motion for a temporary restraining order, you filed that in June of this year, correct?

A Yes, ma'am.

Q Okay. And you had not received a disciplinary for failing to comply with the grooming policy since the previous July, correct?

A That's correct.

Q All right. And at some point after you received those disciplinaries back in July of 2010, you acknowledged at one of those disciplinary hearings that you had been following other law, but that you acknowledged that you were now incarcerated in the Department of Correction, that you needed to follow the laws of the Department of Correction?

A That's what I stated at the time.

Q Okay. What changed? Between July of 2010 and June of 2011, what changed?

A Several things changed.

Q Okay.

A Do you want me to go into them?

Q Please.

[22] A Given the stuff that's happened in the Muslim world, the – the occupation of Afghanistan, Iraq, places like that, when I see brothers being murdered in those countries, when I see them dying for this type of stuff, at this point it – it comes – it makes me want to continue to try to follow the religion as much as possible, because there's brothers dying for this very thing over there. They're dying for these beliefs. And for me to sit over here because some prison administration thinks that, oh, well, you know, we don't think he should grow a beard because it's a security issue, never mind what his religious beliefs are, we're not going to try to accommodate his religious beliefs at all as it relates to his belief in growing the beard, at that point my – you know, I'm – I believe I have every right to challenge that. And that's what I've done.

Q You don't have any case law with you or anything showing that the *Fegans* case is no longer good law, do you?

A That it's no longer good law?

Q In the Eighth Circuit? Yes.

A Not that I'm aware of.

Q Okay.

A My – but what I would like to point out again is that the problem with the *Fegans* case was that Michael Fegans argued for unrestricted beard and hair growth. I am only arguing for a half inch beard because that right there is – is still [23] contributious to the security and good order of the institution. There is no problem with a – somebody growing a half inch beard. In fact, in some other cases, the courts have ruled that – that the – that correction personnel can exercise common sense and visual inspection to determine whether or not there is a – a weapon or any type of – any type of contraband there, that they're trained to do this.

And also, the issue is, is that since it's been argued that having a beard can help alter your identity should you try to escape, I would be willing to go so far as to say that – that the Department of Correction can practice what other, like the New York Department of Correction does, when they come in, they – you take a clean shaven photo, and then they allow the – they allow them to grow I believe in New York it's a one inch beard, they take another photo of them at that point, and that way they have them for comparison purposes. And, in fact, there – it's been stated in some of these cases that – that the issue of the weapons is not something that's that big of an issue as far as putting it in the beards, that they're using – they can hide them anywhere else on the body.

Q They can also hide them – if allowed to wear a beard, they can also hide them in a beard?

A If they allow the beard to grow unrestricted. You cannot hide anything – again, Ms. Cryer, you cannot hide anything in this beard. You can't stand there and tell me you can hide [24] something there.

Q You might not be able to, Mr. Muhammad, but other inmates might be able to if they were allowed to grow a half inch beard?

A A half inch beard, this – this right here is getting close to a half inch beard. You can't even barely hide a razorblade in it, Ms. Cryer.

Q Well, actually, let's talk about that for just a little bit. When is the last time that you received a haircut?

A When is the last time I received a haircut?

Q Yes, sir.

A The last time I got in the barber chair was about three weeks ago.

Q How did that go?

A I went down there to get the beard within compliance of what I said I would wear a half inch beard on, because it was getting a little scraggly, so I was getting in the chair to have it trimmed up, and the barber tried to shave it nearly all the way off.

Q What happened then?

A After he was told twice not to do it.

Q What happened then?

A At that point, I informed – I informed Warden Warner and Major Robertson that – that I had a problem with the man and that he couldn't come around me anymore.

[25] Q What exactly did you say with regard to you have a problem with him?

A I said I was at war with him.

Q Okay. What does that mean to say that you're at war with him?

A I have – I have an issue with him, but I – I went on to explain to Captain Tate when he asked me what I meant by that and I wrote down in the witness statement that I did not intend that as a threat, that was not a threat, it was spoken in the heat of anger, I was upset at my beard being shaved off – nearly all the way off after I told the man three times that I had a court order allowing me to grow a half inch beard, to trim it down to a half inch, and he tried to shave the whole thing off.

Q So you don't want to be shaved or cut by that barber again, correct?

A That's correct.

Q What happens if the next barber tries to cut your beard below where you want it to be, are you going to be at war with that barber as well?

A would be upset with him, but I have to – I have to – I have to temper my viewpoints at times because I do hold very stringent beliefs when it comes

to the beard situation. When it comes to this religion, I hold it very, very seriously.

Q So I guess my question is are you going to threaten the [26] next barber that cuts your hair or your beard in a way that you're not happy with?

A There was no threat there. As I said, I did not intend it as a threat, I did not threaten that man. All I said was I was at war with him. You can take those choice of words to mean how you want to because –

Q Did you mean that you thought he was a friendly, swell guy and that that's why you were saying you were at war with him?

A All I said was – and the reason that I had an issue with him was because he tried to cut my beard off after I told him twice not to.

Q And again, that – the barber was an inmate, correct?

A Y.., ma'am.

Q Not an officer?

A Right.

Q Okay.

A I would point out that the officer that was on duty that day took me down there to the barber chair and told the barber – told the barber this man needs a shave. And I told him when he started getting the clippers out, I told the man cut my beard down to a

half inch length, I have a court order that says I can do so. And instead, he goes and takes nearly the whole thing off.

Q Again, the inmate does, not the officer, correct?

A That's correct.

[27] MS. CRYER: Okay. Your Honor, I don't believe at this time I have any more questions of Mr. Muhammad.

THE COURT: All right. Sir, you may stand down. Thank you.

THE PLAINTIFF: All right.

(Witness stands down.)

THE COURT: Sir, did you have any other evidence that you wanted to present at this time? Because now what I believe should happen is I believe that it's the defendants' burden to show that – well, essentially, answer the question of whether security can be achieved while not substantially burdening your – is it impossible for them to achieve security without substantially burdening your free exercise of religion, so, I mean –

THE PLAINTIFF: There is one other thing, Your Honor, I would like to bring out. I made an effort before we came here today to deal with this issue about whether an injunction was necessary or not. I wrote a letter to Ms. Cryer and informed her that I

would be willing to stay in ad seg, to stay in administrative segregation, and as long as I'm allowed to grow that half inch beard, you know, I – you know, I wouldn't be walking the hallways, I wouldn't be doing anything like that, so, therefore, it wouldn't be an issue out in the population, if that was that their position. I offered to try to negotiate that. But I heard nothing back, so I thought I [28] would let you know that – that I did try to do that.

I would also point out to you that even though there has been a restraining order in place, that I've still been subjected to harassment on the part of ADC staff at various times. In fact, being locked up in ad seg under investigation on the grounds that Major Robertson stated that I had been in the law library and had typed a order up on the law library computer. When I told him that the order was valid, he tried to state that I had forged Judge Miller's signature. Even though I was let out of the segregation several hours later, after it was determined that the order was in fact valid. Going down the hallway – I even had to go and ask Warden Warner for assistance because I would carry the order in my pocket because certain shifts weren't notified that the order was in effect and that I was allowed to wear the beard, so officers and people in positions of authority would try to harass me and threaten to lock me up for having the beard and would say they didn't care what the order said, they didn't care that – if it came from a federal judge or not, this was the Department of Correction, this wasn't the feds. So I had to go again

to Warden Warner and asked to – for him to re – to put another memorandum out to tell these people to leave me alone because it's a valid order. I couldn't even go to breakfast in the morning times because I was being harassed by staff in the hallways. So I thought I would – I was bringing [29] it out to you that – you know, that an injunction really is needed on this. It really is, because of the fact that, as you can see, this beard right here – this beard right here, you can't hide anything in it. It is – it is a – it is a belief of mine that you should grow it out, the state would not be harmed by – by you continuing that injunction. If the injunction only applies to me and not the rest of the ADC, again, I don't – I don't see how there would be a problem in that regard either, because if I'm the only one that's allowed to – that's allowed to do this, then I don't see that there's going to be 16,000 inmates walking around the ADC with half inch beards on their faces.

THE COURT: Well, let's let the defense proceed. You're getting a little bit ahead, you're kind of making your argument in closing. And so, let me hold off on that.

And on the ad seg, wasn't that proposed by the *Fegans* – in that case, was that the – I thought it was proposed as an alternative in *Fegans* and the Eighth Circuit rejected that as unduly burdensome on the ADC.

MS. CRYER: I was going to say, Your Honor, I would like to respond to what Mr. Muhammad

said and it also may be necessary that I question him a little bit further based upon what he has just testified to.

With regard to the ad seg, I mean, Mr. – first of all, Mr. Muhammad placed himself, requested to be placed in ad [30] seg. It was not a matter of the Department of Correction placing him there. He did send a letter. I did receive it last Friday. Due to the holidays, he has not received a response back for what we consider to be a settlement offer.

I think that based upon other cases that have been decided recently in the Eighth Circuit with regard to housing someone in ad seg for an unlimited amount of time, I don't believe the Department of Correction – that that's something that they could seriously consider doing without facing potential lawsuits of Mr. Muhammad being housed indefinitely in administrative segregation. So I don't think that's a fair –

THE COURT: It was proposed in *Fegans.* I know I've read that. It was proposed in *Fegans* and the Eighth Circuit has rejected that because it says:

> "This option, like the others proposed by *Fegans,* would allow accommodation of religious observances to override other significant state interests, we agree with the district court that AD 98-04 withstands scrutiny under RLUIPA."

So, I mean, that was proposed before and the Eighth Circuit, they rejected that over the objection of the defense.

[31] But your point is well taken, Mr. Muhammad, and again, I want to – I think, you know, if we can – the issue here, you know, really is so closely related to the merits of the case, and that's not why we're here to ultimately have a disposition of the case. But, I mean, to me, and ultimately it boils down to whether or not the – whether or not we can have the ADC meeting their security objectives without substantially burdening your religious freedom. I mean, that's it in a nutshell. And so it really is incumbent on them – the way it works, Mr. Muhammad is that they have to ante up now, they have to say we can't do it, we can't allow you to grow this beard because of whatever the reasons are. I know what the reasons were in *Fegans*. I'm interested to hear what the reasons are now. And then we'll just have to, you know, see what happens. I mean, I'm going to hear from them right now. But I want to stay focused on that line of thinking here, because that, to me, is the critical part of this, what are the security concerns that they have. And again, you know, Mr. Muhammad, the law, as you know – I mean, you've obviously read these cases – but, you know, in general, the law is very much restrictive on me getting involved in prison administration. Okay. And frankly, I mean, that's – you know, they don't get involved in the judging business and I don't get involved in the prison administration business. Okay. And there's a

reason for [32] that. You know, I'd be a lousy prison administrator. And they have the experience and the knowledge, and, you know, I'm sure a lot of times you disagree with the way they do things, but the bottom line is they're the ones trained in doing that and I'm not entitled to, under the law, to meddle in prison administration unless it somehow infringes on your constitutional rights. And so, I'm -- what I'm trying to say here is the thrust of this has to be on what are the security concerns, can they achieve concerns and still allow you to grow a half inch beard or not? And so, that's really where I'm focusing. Okay?

And I don't know, you know, what the answer is, but we haven't heard from Ms. Cryer and her folks. So let's hear what they have to say. And you'll have every opportunity to cross examine them and build your record. And then we'll see where the chips fall. Okay?

THE PLAINTIFF: Okay.

MS. CRYER: Thank you, Your Honor. I'd like to call Warden Gaylon Lay.

GAYLON LAY, DEFENDANTS' WITNESS, SWORN.

DIRECT EXAMINATION

BY MS. CRYER:

Q Mr. Lay, would you state your full name for the record, please?

A Rex Gaylon Lay.

[33] Q And where are you currently employed, Mr. Lay?

A Arkansas Department of Correction, Cummins Unit.

Q And how long have you been the warden at the Cummins Unit?

A Going on nine years.

Q And just to make sure, you are aware today that we are here with regard to inmate – I'm going to call him Gregory Holt, because I believe that that's the pleading that the name was filed under, but he's also going by the name – last name Muhammad?

A Yes.

Q That we are here with regard to his request to ask this Court to allow him to be able to grow a one half inch beard; is that your understanding?

A Yes, ma'am.

Q Okay. Mr. Lay, let me just start off by asking you do you have any problems or concerns with inmate Holt or inmate Muhammad being allowed to grow a one half inch beard?

A I do. Yes, ma'am.

Q Okay. Would you please explain to the Court what some of your concerns are?

A My concerns revolve around security. A person can quickly alter their appearance if they're allowed to grow a beard, they escape while they're out on a court run or from a facility or whatever, and immediately shave. They alter their appearance. There are some differences, for example, if you [34] look at Mr. Muhammad's beard, his is rather thin on the sides and kind of thick around here, he may or may not be able to hide something as simple as a homemade dart, I'll just use that for an example, we have over the years found some of those at another facility, but other people, individuals, are different, the next guy may have a half inch beard that's full and – full face. I mean, there are just a large number of variances in different people when it comes to facial hair.

Also, you're – I don't know how you would – I don't know how you would manage that if people were allowed to grow a half inch beard. Okay. How are you going to measure that on a consistent basis? How are you going to keep down conflict?

At the current time, the only person I'm aware of, out of over 15,000 inmates, that has a legal order to grow a beard – now, there are some medicals for a quarter inch beard – but to grow a half inch beard is inmate Holt. And as you can see from his own correspondence, he's already threatened the barber over the manner that he cut his hair. Can you imagine trying to manage that for 15,000 people?

Q Okay. Well, even if we're not talking about other inmates, let's discuss inmate Holt. How often are inmates allowed to go and to get a haircut and a shave?

A Weekly, at least.

Q Okay. Let's say –

A If they're in general population, they are actually issued [35] a razor. They keep it in their personal property.

Q All right. And what about Mr. Holt or Mr. Muhammad who has placed himself in administrative segregation?

A Weekly.

Q Okay. What if any time during that week, let's say, Mr. Muhammad chooses to go every two weeks or every three weeks to the barber, do you have any concern as to how that shaving process or that is going to go based upon past experience with Mr. Holt and what happened with the barber earlier this – earlier – or last month, in December?

A Well, certainly, I do. I mean, if – if Mr. Holt sits in a barber chair and says I want a half inch trim, which would be in compliance with the order he currently has, I guess, how is that barber going to determine, okay, you know, this is exactly a half inch, it's a little longer, a little shorter? Even if it's exactly what he ordered, are they going to be in agreement

over that? And you've seen the result and the documentation of what occurred that one time.

Q And, to your knowledge, what was the documentation and what did occur with Mr. Holt and the barber in December of 2011?

A According to the inmate barber and the officer that was there, Mr. Holt asked if he could go to the barber chair, as the officer was making his rounds for haircuts, and get a trim. And the officer took him to the barber chair, as he did [36] everybody else that requested it on the wing. And when the guy – when he sat down, according to the inmate barber, he never told him anything about a particular length or anything until after he had shaved him with the clippers, and he said then Mr. Holt acted as if he was angry, objected, said, you know, I'm supposed to be able to keep a half inch beard. And the barber said I wouldn't have had a problem with that, or I would have at least asked staff if that was the case, had he mentioned it. But the inmate said he never mentioned that until after the fact.

Q When an inmate is receiving a haircut or a shave from an inmate barber, is security staff located inside that area or around that area?

A In segregation, yes, the officer escorts him there and stays in the vicinity until he escorts him back to the cell.

Q How far – you just said stays in the vicinity, what is the vicinity?

A Within three or four feet.

Q Okay. Would you have any concern with security needing to be present or even additional security needing to be present every time inmate Holt goes to the barber chair?

A After this particular incident, yes.

Q Okay. Any concerns about inmate Holt being around the inmate barber that gave him, for better words, the wrong cut of the beard last month?

[37] A Certainly. I mean, the statements that he made were obviously a threat. We perceived them in that way and have taken precautions not to allow that barber around inmate Holt again.

Q Okay. Can you do that every time inmate Holt has a disagreement with a barber, can you just switch barbers out?

A No, ma'am, I think eventually I'd run out of barbers if I tried to satisfy what Mr. Holt wants or Mr. Muhammad.

Q And again, with regard to the length of the beard that he is requesting, how would you monitor or how could your unit or the department, for that matter, monitor how long exactly his beard is each and every day?

A I'm not sure. Someone would have to show me how to do that.

Q Okay.

A I mean, you could start, I guess, with a particular clipper guard that's a particular length, but depending on the individual, in two, three days, how frequent is he going to have to trim that and how are we going to know that? You see them going down the hallway, but you obviously can't stop and pull a tape measure on everybody's beard, I wouldn't think.

Q Let me ask with – Mr. Holt mentioned something about not being able to hide contraband in his beard. Do you know, have you observed whether or not inmate Holt has attempted to put anything in his beard to see if it would stay or if it would [38] fall out?

A I have not, no, ma'am.

Q Are there any forms of contraband that you, as the warden, would be concerned about possibly being placed in a beard that was a half inch long?

A Certainly. And again, depending on the individual, some individuals would have more ability to hide something than others, depending on how their facial hair grows, the thickness of it, et cetera, and that sort of thing.

Q What types of things?

A Anything from razor blades to drugs to homemade darts. I mean, there are a wide variety of things. Those are just what I think of off the cuff. Inmates are pretty creative and they have 24 hours a day to think about things like that.

Q Okay. Well, what about Mr. Holt's statement that he can't hide anything in his beard – I don't know how else to ask this – but is that good enough for you?

A No, ma'am, I don't believe – I don't believe it would be.

Q Does that provide you with comfort knowing that Mr. Holt is not going to hide anything at any time or attempt to hide anything at any time in his beard?

A It does not, no.

Q And is that opinion based on – what is that opinion based on?

A Based on experiences and – and experiences in dealing [39] with inmates over the last 36 years.

Q And with regard to an inmate changing his appearance, can an inmate change his appearance other than shaving or growing a beard?

A I suppose. I suppose they could shave their head, but that's just one more avenue that you've added to the possibilities.

Q And I believe you heard Mr. Holt's testimony that he knows for a fact that inmates hide a lot of contraband in their hair on top of their head?

A Yes, ma'am, I heard that.

Q Are you concerned as the warden at the Cummins Unit about contraband being passed along from inmate to inmate at your unit?

A Certainly, I am. I mean, we spend an astronomical number of hours conducting searches, housing area searches, random individual inmate searches, all sorts of things. And still, occasionally, you're going to find contraband.

Q Over the years, and I'm going to use the year 2006, and I'm picking that year because that was the year that Judge Moody issued his ruling in the *Michael Fegans* case, from 2006 to the present time, based upon your knowledge and experience, has the amount of contraband that inmates have been caught with or discovered with at the Cummins Unit, has that decreased at all?

[40] A No, ma'am. As a matter of fact, it has increased. The population and the type of inmates we seem to be getting from society now are more violent, they're younger, there are just a gambit of things that make them different than the population we were used to dealing with in the 70s and 80s.

Q And what if you – what if you have an inmate who is allowed to do something special, that he is allowed to do something that other inmates are not allowed to do, such as grow a beard, even if it's a restricted length beard, but is allowed to grow a beard, do you have any security concerns for the safety of that inmate?

A It could possibly make him a target of other inmates. Yes, ma'am.

Q And, Warden, let me ask, the current policy of the Department of Correction, the Court made reference to the policy 98-04 earlier with regard to the policy that was in the *Michael Fegans* case, to your knowledge, is that the same policy that applies today with regard to the grooming policy?

A Yes, ma'am, that's not changed to my knowledge since –

Q Does the – sorry.

A – that time. I'm sorry.

Q Does the grooming policy make any allowances for any type of religious exemptions?

A No, ma'am.

Q Okay. As warden of your unit, have you personally done [41] anything or have you instructed anyone to prevent inmate Muhammad from having religious articles or materials with him that he feels are important in order to facilitate his religious studies?

A No, ma'am. There was one thing that occurred, an individual tried to send him a Koran through the mail, and we searched the inmate's property and – and discovered that he had three in his possession currently, and it's against policy for it to come from an individual, he would have to order it

from a bookstore or a business that provides that type of literature.

Q What happened to the Koran that was sent to you from the outside individual?

A We mailed it back to the individual that sent it.

Q Okay. And was that based upon your desire for inmate Holt or inmate Muhammad not to have a Koran to study with?

A No, ma'am. As a matter of fact, that's why we searched him, was to make sure that he did have one before we denied it, and we, of course, would have had the chaplain guide him in the correct way to get one. We still would not have been allowed to let him have the one that came from an individual.

Q Why can you not allow him to have something that came from an individual?

A People offer them, we get all kinds of things in the mail that shouldn't come in a correctional institution, that are [42] concealed in mail, books, religious materials, different things.

Q Do you allow or does your unit allow inmates to request certain religious materials from distributors that are accepted and approved by the department?

A Yes, ma'am, and they can work through the chaplaincy's office and gain access to those addresses and places that are available.

Q Okay. And again, with regard to administrative segregation, inmate Holt mentioned that he would be willing to stay in ad seg, do you have any understanding or knowledge as to why inmate Holt is currently in administrative segregation or was in administrative segregation?

A He had chosen –

THE PLAINTIFF: Objection. I object to that because the person who could testify to that is here. So it would be hearsay from what he's saying.

THE COURT: Well, at this type of hearing, I think hearsay is allowable under the Rules, so I'm going to allow it. And then if you want to call the other witness, if there's any – if there is any question of – well, let's hear what he has to say. I mean, if there's a question of whether or not it's accurate or not, you can call the witness, because that's your hearsay objection, it's based on accuracy.

THE WITNESS: He's in segregation this last time [43] because he requested to be there in writing.

BY MS. CRYER:

Q Okay. And Mr. Holt testified a few moments ago that he was being harassed by officials at the Department of Correction with regard to the order saying that he could grow a half inch beard. Mr. Lay, have you done anything to harass inmate Holt with regard to his order not being allowed to – or to allow him to have the half inch beard?

A No, ma'am, I have not, nor have I instructed anyone else to.

Q How did you learn about the order that inmate Holt had that would allow him to have a half inch beard?

A I received a call. I was actually off, I think on vacation. I received a call from the duty person. I don't remember if it was Mr. Warner or Major Robertson. But Major Robertson had stopped inmate Holt in the hallway because he was out of compliance with the grooming policy and was going to write him a disciplinary. And inmate Holt presented the order that he had from the court. And, of course, being corrections folks, we were a little bit suspicious about its authentic – about it being legitimate, because normally anything the court issues, we get, at least, a copy of. And normally, we'd get it before the inmate, I would think, usually. So that seemed extremely unusual. And I think the major did place him on investigation, and then after it was [44] authenticated, released him from segregation.

Q Do you know what time period it was that inmate Holt was kept in segregation or on investigative status?

A It was released the same day.

Q Okay.

A I don't know if it was an hour, two hours, or three hours.

Q Okay. Is that how you first became aware that there was an order allowing inmate Holt –

A Yes, ma'am, that was the first –

Q – to grow a beard?

A – first I'd heard about it.

Q Okay. And I believe Mr. Holt testified earlier about how if he was not in compliance with the grooming policy, that he faced the possibility of being issued a disciplinary for being out of compliance with the grooming policy?

A Yes, ma'am, that's correct, as was any other inmate.

Q Is being out of compliance with the grooming policy the only infraction or rule violation at the Department of Correction that an inmate can be issued a disciplinary for?

A No, ma'am. There are numerous. As a matter of fact, Mr. Holt directly reflects that. I mean, he's had some for threatening folks, I think, and some various things.

MS. CRYER: Your Honor, I believe at this time that's all the questions that I have of Warden Lay.

THE COURT: Thank you, ma'am.

[45] Mr. Muhammad, you may ask.

CROSS EXAMINATION

BY MR. HOLT A.K.A. MR. MUHAMMAD:

Q Good morning, Warden.

A Morning.

Q Get back to something that you were saying when you first started out. The reason I'm in ad seg is not because of the fact that I requested it, is it, Warden?

A Yes, I believe it is. I believe we have a written statement to that effect.

Q In fact, I was assigned by the classification by Warden Warner, was I not, regarding a disciplinary I had received, written by Warden Weekly; is that correct?

A Not –

Q Were you not aware of that?

A Not this time. If I remember correctly, you've been out of segregation and back since that disciplinary. Is that not correct?

Q That's correct.

A Okay. This time, based on your request.

Q And did I also not, two days later after that, ask to be returned back to population and stated the issue that I had had been resolved and I wanted to go back to population; were you aware of that?

A After you were placed there this time? Are we speaking of [46] the time that you're there now?

Q After I requested it, yes.

A No, I'm not aware of you requesting to go back to population.

Q So you're not aware – you're not aware then that there was an objection to my going back to population by one of the defendants in the case; were you aware of that?

A No. No, I was not.

Q Okay. Now, on the issue of the barbers, how do you choose who is designated a barber and who works as a barber at Cummins Unit?

A Classification Committee selects them. As they come through classification, we try to place people in areas where they have job skills. If a guy comes through and says he's been a barber somewhere, particularly if he's a licensed barber, you don't run across many licensed barbers, but you do run across some people that have cut hair and had experience in that area, then they would be considered for that job.

Q Now, would the two barbers that you have come in to ad seg or 14/16 Barracks in the east building, are – are both of those trained barbers?

A I couldn't testify to their training without talking to the individual and looking at their institutional file. I do know that the last barber that was in

that area has been promoted to the free line barber and cuts staff hair.

[47] Q So the barber that – that you discussed, that we discussed in here, that I've had the issue with regarding a beard trim, you don't know whether he's a trained barber or just – just somebody that the classification said, okay, he says I want to be a barber, I want to be a barber?

A I think I answered it, but I'll answer it again. I couldn't testify to that without talking to the individual or looking at his institutional file.

Q Now I want to ask you about the situation where you stated that you – you talked to the barber in question, the one who shaved – nearly shaved my beard all the way off, you talked to him and he told you that I never requested or said anything about a half inch beard until after the fact; is that what you're saying?

A That's what he told me, yes, during the interview.

Q Now, would you – would that – could it be a possibility that based on the situation and based on the information that you had, knowing about this court order, that when this barber was confronted with this – because there was a grievance written, was there not, by me?

A I don't remember – I don't remember if it was a grievance or just a written complaint, but, yes,

that's how I became aware of it, was something that was received from you.

Q Now, is it possible the barber lied?

A Sure, that's a possibility.

[48] Q So just because the barber said I didn't say anything, doesn't mean that I didn't say anything, correct?

A Well, the officer, I believe, kind of corroborated what the barber said, and that he didn't hear you say anything about that to the inmate barber. I talked to – I talked to every individual that was in that area after receiving your mail.

Q Did you – when you talked to the officer, do you remember which officer it was?

A I don't remember his name right offhand, no.

Q Did he state that – did he tell you where he was at during this whole – during this whole episode at all?

A He said he was in a close vicinity – close proximity, three, four, five feet, somewhere in that horseshoe there – or that area where they cut hair, not the horseshoe, but I think it was in one of the day rooms if I remember correctly.

Q So if you hear – let me ask you this. If you hear two inmates into a conflict, especially one in handcuffs and one not, one has got access to sharp weapons, the other one doesn't, if you hear – that if

an officer hears two inmates in a conflict, wouldn't it be the officer's duty to remove – to separate those two inmates so that the conflict is squashed?

A Well, I believe that's what occurred. You were taken back to your cell immediately following the incident, were you not?

[49] Q Yes. Were you aware of – or let me ask you this. Were the COs that were back there in the east building, were they made aware at all that there was a court order in place regarding me and that I was not to be bothered regarding the beard at all?

A I know the captain and the major knew that. I hope they passed that information on to the correctional staff. I have to believe they did, as no one has written you a disciplinary for being out of compliance with the grooming policy.

Q Okay. Now you mentioned about inmate identification as it relates to beards; is that correct?

A Yes.

Q You're concerned that if inmates were allowed to grow half inch beards in the ADC that they will be able to alter their appearance and – should they escape or anything like that?

A Certainly.

Q Wasn't there an escape recently at Cummins Unit, sir?

A Yes, a couple of years ago.

Q And those inmates that escaped were actually dressed like officers, were actually in compliance, like officers would wear, with their – with their facial hair neatly trimmed, no beard and that type of stuff, would that be not – would that not be accurate?

A That's correct. Yes, they were dressed as officers.

Q So a beard alone is not going to cause somebody to be able [50] to necessarily alter their appearance, the lack of it, or to have one, in the event they want to escape, they can alter it some other way, right?

A Well, certainly, there are many ways you can alter your appearance, I guess, but a beard being one of the easiest and quickest.

Q Okay. And you mentioned about the – your concern about weapons being hidden in the facial hair, I believe you mentioned darts, I believe you mentioned razor blades, things of nature; is that correct?

A Yes.

Q Would it be safe to say that the weapons that you have found during shakedowns in Cummins Unit, the times that you have found them, are either – or have they ever been on somebody's face at all?

A No, because we have a grooming policy. They don't have beards.

Q Okay. So – so the weapons are other places, correct? They're on their clothes, in their rack, wherever, they can hide them any number of places in other than just the beard, correct?

A We find contraband various places, yes.

Q Okay. So just having a beard alone is not going to – is not going to cause a great increase in the flow of contraband, is it?

[51] A It'd cause a great increase in the number of places to hide it.

Q So you would say then that – that even though there's the clothes, the socks, the shoes, the boots, things of that nature, the coats, any number of clothings that you all issue at Cummins, people hide stuff in there regularly, correct?

A They have, yes.

Q So, again, a beard is not going to be necessarily the – the preferred choice of hiding things, wouldn't you say?

A Well, now, that depends. You know, inmates are pretty creative, as I stated earlier. They watch staff, watch how they monitor things, watch what staff do. And after watching a particular staff person on a post for a period of time, that's how they figure out how to beat that staff person, about what they are checking and what they're not checking, what they may not be comfortable with checking. I don't know how many correctional officers would be comfortable

with running their hand through a man's beard. I don't know. You know, but I really don't think that that would benefit the overall goal and mission of corrections to have to do that.

Q Now, you have other ways to identify inmates, don't you?

A Such as?

Q Do you not – is it not policy – is it not policy of the Department of Correction to issue inmates IDs that they wear around their neck and also put their name and their ID number [52] on their clothes; is that correct?

A Yes, they carry an ID badge. That's correct.

Q So, and they also have their name and ADC number on the back of their – the front and back of their clothes; is that correct?

A Yes.

Q So you can – you can identify – the purpose of that is so that you can more readily identify those inmates in the case of an officer having a contact with them, correct?

A We put a name and a number on the clothing hoping that they'll continue to wear the ones that are issued to them and not trade them out, but, no, that's not – that's not a very good method of identifying anyone, no.

Q So what happens if they're caught wearing clothes they're not supposed – that are not issued to them?

A Will get a disciplinary, unless for some legitimate reason their clothes were not back from the laundry or something.

Q And you issue – you issue ID cards; is that correct?

A That's correct. Yes.

Q And the reason that you issue cards, such as these right here, is so that you can again readily identify inmates in the department – in your unit, would that be correct?

A Well, yes, if we issue the ID badge though of you without a beard, and then three months later you grow a beard, then you've altered your appearance from that ID badge.

[53] Q So let me ask you this, how –

A And vice-versa.

Q – how many years have you been – again, did you say you've been a warden?

A I've been a warden at the Cummins Unit for nine and at the Delta Regional Unit for five.

Q Okay. And you're aware – are you in contact with other Department of Corrections around the

country; do you ever have any contact with them at all?

A Yes, occasionally, through training, we do through the American Correctional Association and other avenues.

Q So if other prisons, major prisons, such as New York, California, places like that, if they're able to do this very same thing that I'm proposing, why would it be so hard for Cummins Unit to do the same thing?

A You know, I suppose maybe that's an individual preference in those states. I can't tell you for what reason they've elected or chosen to go that route. I do know that many, many of those institutions are very different from Cummins and from the mission, and I'll give you one good example, is the majority of those institutions that you're referring to are cell block housing units where everything is one or two man cells practically. The Cummins Unit has a lot of open bay barracks that house up to 35 to 45 individual inmates, it's as high as 50 in some instances. So, yeah, that's just one of [54] many scenarios that are a lot different from our mission and the way we're designed as opposed to maybe somewhere you're talking about in California or – or New York. I'm not aware of very many states out there, for example, that operate an agricultural program like we do in Arkansas. The Cummins Unit is attached to a 17,000 acre farm. There are a lot of people come and go in and out of the confines of that fence performing that

work and those duties. So we're certainly a lot different. So I don't know why, you know, their preference would be to go that route, but, I mean, that's their preference obviously, or maybe law in that particular circuit, I don't know.

Q But if they're able to do it without problems and they – they seem to be able to be getting along fine, what would be the problem with the Department of Correction allowing somebody to grow a half inch beard?

A The problem would be the reasons that I've stated. And I certainly would like to talk to some of those administrators and see if they didn't voice some of the same concerns even though they do allow that.

Q Now, you were saying there's how many – how many inmates, rough estimate, are in the Department of Correction as we speak right now?

A Excess of 15,000. It may be up closer to 17,000 currently.

[55] Q Now, of those 15,000 inmates, would it be fair to say that not everybody can grow a beard, right?

A Right now, no one can except yourself and those that have a medical script.

Q The question I'm asking you though is would it be fair to say that in the Department of Correction that should – should this Court or whoever in the future so find that we should be allowed to grow a

half inch beard, that not everybody in the ADC can grow beards; is that correct?

A Do you mean physically?

Q Physically grow beards.

THE COURT: I understand where you're going with that, Mr. Muhammad, but why don't we move on. I understand where you're going with that. I don't think it's very compelling on what you're trying to prove.

THE PLAINTIFF: Okay.

THE COURT: And equally, I didn't find it very compelling that having to manage 15,000 people with beards is at issue either, so.

THE PLAINTIFF: Okay.

BY MR. HOLT A.K.A. MR. MUHAMMAD:

Q Would it be fair to say again that it would be easy to hide weapons or contraband in the head hair?

A Could you repeat the question?

Q I said would it be easy – would it be fair to say that it [56] would be easy to hide contraband in the head hair of an inmate in the Department of Correction?

A It would be as easy to hide it there as it is a beard, I suppose.

Q Okay. So if somebody has hair my length or a little longer on top, you could hide a razor blade in that, you could hide weapons and stuff up there, couldn't you?

A You could, yes.

Q Okay. Now, the issue of ID-ing inmates as far as with the beards, what would be the harm, okay, in allowing when somebody comes into the ADC, requiring them to have a clean shaven photo taken, and then when they grow it out to a half inch beard, taking another photo of them for comparison purposes?

A The problem is they may never grow a half inch beard until after they escape, just using that for one example, or they may come in with a beard, and if we're not allowed to require them to shave, they may immediately shave it after they escaped, or got in some area they're not supposed to be in, to alter their appearance.

Q Have you – has there been a whole lot of escapes from the Department of Correction because people were wearing beards?

A Not as of recent years, thank goodness. I do recall one back in the 70s or 80s where the individual grew a beard and blended in with homeless people in Houston, Texas, and I think [57] two or three years before they captured him, and that was to alter his appearance. Of course, that went the other way around, I think he left the ADC clean shaven and

grew the beard after he got out, and he was eventually apprehended, but.

Q So if – somebody could escape from Cummins then and get out and alter their appearance by growing a beard, right?

A Oh, certainly, if we don't apprehend them before they have time to do that.

Q Okay.

A But if you escape with a beard, and you shave it, then you have immediate means of altering your appearance, like right now.

Q So if – if other – other, again, I refer back to other institutions or other prison systems that allow this to happen, allow people to grow beards, and they're not seeming to have a problem with escapes, what would, again, the – you have – you still would have a problem with people wearing a half inch beard in the Department of Correction?

A Yes.

Q Regardless of other prison administrations doing the same thing and allowing it?

A I can't testify to the fact that they aren't having problems because of that, because I don't know what goes on nationally across the country. Again, I would like to talk to [58] some of those administrators and see what kind of problems that they have experienced because they for whatever

reason have chosen to go that route. But, yes, that would concern me greatly.

Q How long – how long – I know what the policy is regarding the head hair in the ADC. As far as the length on the top of the head hair, is there a specific length they can grow it to as long as it doesn't extend past the earlobe and the nape of the neck?

A There is. I believe that's outlined in the policy. I don't remember exactly what it is. I just know that it has to be off the collar and above the ears.

Q So if somebody has hair on top of their head, they could – they – you know, that they could hide something in there, right?

A Well, you could hide something in hair the length of yours or mine, but that's not excessive according to the policy.

Q So if it could be – my question then is, if that's the case, then why is the facial hair a target and the head hair is not?

A The facial hair just gives another avenue, just adds another place to hide contraband.

Q Okay. But you admit you could hide contraband pretty much anywhere though, right?

A They do hide it in a lot of different places, yes. I'm [59] sure you're familiar with that.

Q Okay. Let me see here. Would a half inch beard – would a half inch beard, for officers being able to identify the length of it, would it be fair to say that you can tell when a beard is getting past a half inch?

A Well, I believe that would change from individual to individual. What you might think just at a glance is a half inch, I may not think is a half inch, or the next person may not think is a half inch. Anyway, how are you going to gauge that?

Q So you wouldn't – so you're telling me that you couldn't – your officers wouldn't be able to look at somebody and be able to tell whether their beard is a half inch or longer and be able to tell them you need to go trim that down because it's getting past regulation?

A You could give an – you could give an approximate look at someone's appearance and say maybe that person is out of compliance, maybe they're beyond the half inch, but then that person is in disagreement, says, well, I'm a half inch or less, and they file a grievance, and then you go through all those steps to handle that. I mean, do you actually call the person in and measure the beard or, you know, how are you going to deal with that on a regular basis?

Q Okay. As far as the Koran that you said was sent in by the individual, in fact that individual was an attorney, [60] wasn't it?

A That's correct.

Q Okay.

A Our policy mandates that it come from a bookstore or a supplier, not from an attorney, an individual.

Q Okay. And you also stated that the first time you heard about the order was when Major Robertson or somebody had called you and told you that I had this court order; is that right?

A Yes, I don't remember if it was Major Robertson or Mr. Warner, but one of the two.

Q And you don't remember – you don't remember admonishing Major Robertson and telling him that the order – that if it was a valid order, he needed to – he needed to let me out immediately, do you remember saying that?

A Well, that's a possibility. I do remember telling the major that that would be highly unusual for an inmate to have an injunction of some sort that we didn't have a copy of or hadn't been informed of through the courts or through legal counsel or somehow.

THE PLAINTIFF: Okay. I think that's all I have.

THE COURT: Thank you, sir.

Do you have any follow up questions of the warden?

MS. CRYER: I don't think I do, Your Honor.

THE COURT: I have a couple. Can you tell me, how do [61] you manage the folks that have the medical script quarter inch beard?

THE WITNESS: We stop them in the hallway, Your Honor, and ask them to present a script if they're not in compliance with the grooming policy, and if it appears to be outside the quarter inch – a quarter inch is pretty much close to what you get using a clipper without a guard, if you just – I don't know – if you just try to shave with a clipper, for example, rather than a razor, that's pretty much what you get. They're pretty close.

THE COURT: Do you know about what percentage of the population has that?

THE WITNESS: No, sir, it's not a very high percentage, you don't run into it with every other inmate, you know, when you're in the hallway, but you do see it.

THE COURT: And with regard to the hair length, Ms. Cryer, do you know – does somebody know, can somebody speak, is there actually a – I know you said you didn't have – you thought it was in the policy, but you didn't know for sure, I'd like to know what the policy actually is, is there a length per se or is just to the collar, like you said, I mean?

MS. CRYER: If you will give me just a minute, I'll look for the policy, because I think I brought a copy.

[62] THE COURT: Okay. And you don't have to look that up right now, I mean, I -- if somebody could speak to that, I'd like to know what the actual policy is, because my next question then is, have you actually had people hiding contraband in their hair?

THE WITNESS: I can recall one coming into segregation back when I was a uniformed officer with a marijuana joint in his hair, yes, sir.

THE COURT: Okay. But anything recent?

THE WITNESS: Not recently, no, sir.

THE COURT: All right. And then that also brought me to another question is you've obviously been a warden for 14 – 13 years or going on 14?

THE WITNESS: Yes, sir.

THE COURT: And how long have you been in the prison business?

THE WITNESS: 36 years and some odd months.

THE COURT: And you started out as a CO?

THE WITNESS: Yes, sir, at Cummins.

THE COURT: At Cummins. Last question, the Ninth Circuit case, it appears that they have a grooming policy and then the Ninth Circuit allowed this beard, half inch beard, have you had any sort of correspondence, any training, or anything based on

that, that the California officials have mentioned anything or come and spoken at any conference or [63] anything, have they talked about what the impact has been in their prison system?

THE WITNESS: No, sir, I haven't had an opportunity to visit with anyone about that. As a matter of fact, I wasn't aware of that case until this came up.

THE COURT: Got you. Okay. Thank you.

MS. CRYER: Your Honor, I think I have just one question.

REDIRECT EXAMINATION

BY MS. CRYER:

Q Mr. Lay, are you responsible for creating the ADC policies with regard to grooming?

A No, ma'am. That would come from the Board of Corrections.

THE COURT: Any follow up?

THE PLAINTIFF: I have one.

THE COURT: Yes, sir.

RECROSS EXAMINATION

BY MR. HOLT A.K.A. MR. MUHAMMAD:

Q But you are responsible for enforcing it, correct?

A That's correct.

THE PLAINTIFF: Okay.

THE COURT: Warden, you may stand down. Thank you, sir.

THE WITNESS: Yes, sir.

(Witness stands down.)

[64] THE COURT: Your next witness?

MS. CRYER: Thank you, Your Honor. I know I'm going to have one more. That's going to be Grant Harris.

THE COURT: All right.

GRANT HARRIS, DEFENDANTS' WITNESS, SWORN.

DIRECT EXAMINATION

BY MS. CRYER:

Q Mr. Harris, would you state your full name for the record, please?

A My name is Grant Edward Harris.

Q And, Mr. Harris, where are you currently employed?

A I'm currently employed with the Arkansas Department of Correction. I am an Assistant Director of Institutions.

Q And prior to being the Assistant Director of Institutions, what was your position with the Department of Correction?

A I was the warden of the Varner Unit, which encompassed the ad seg Supermax, for a little over six years.

Q Prior to being the assistant director, how long in total were you a warden for the Department of Correction?

A Approximately 18 years.

Q And when did you first begin working at the department?

A I began my career at Tucker Unit in 1979, and at that point there were only three facilities within the state of Arkansas.

Q Okay. Mr. Harris, you've been present in the courtroom [65] for the testimony of both inmate Muhammad, as well as Warden Lay; is that correct?

A Yes, ma'am, that is correct.

Q Okay. And did you hear Warden Lay's comments or concerns with regard to contraband?

A I did.

Q Okay. Let me just ask this, and we can kind of circumvent some of my questions, was there anything with regard to Warden Lay's testimony that you disagreed with?

A No, ma'am, there's nothing that I would disagree with. In fact, I would like to really amplify on one point, if I may.

Q Sure.

A If it please the Court? You know, certainly weapons are a concern when it comes to facial hair, but I think one thing that we really need to touch on this morning is what we've been experiencing as an agency within the last few years, and that's the introduction of cell phones which are coming into our institutions. Last year alone, we probably confiscated in excess of a thousand cell phones at all institutions. What's unique about a contraband cell phone is that our phone system records conversations and this is how we gain intelligence, with the exception of legal or attorney calls, those calls are not recorded. So we use the recorded calls as a means of gaining intelligence to see who is trying to smuggle in what within the different institutions or who is dropping something [66] off.

When I was the warden at Supermax, I guess what was amazing to me is just as we had closed one avenue of receiving contraband and weapons and drugs within the institution, another one would open

up. The cell phone was the means of making that avenue happen. I remember one particular situation, we never identified the visitor, but due to the shape of the package, the visitor would go into the restroom, it was in a body cavity, would actually flush the marijuana, the rock cocaine, black tar heroin, down the commode, it was tightly wrapped in cellophane and duct tape. The trusty, who was outside the fence, who was working the sewer pond, who was, you know scraping, getting everything up, was actually fishing that out, he was carrying it back to maintenance, he was breaking it down, he was bringing it in the back door of our kitchen. And believe it or not, the inmates in the main kitchen were working it, again repackaged, in the food, taking it down the hall to Supermax to ad seg. What was amazing about this is they may not necessarily try to move a whole cell phone or a large amount at one time, they moved maybe it was something that was just a piece of that object, and actually put it together. So when you get to the dining facility in the Supermax, you've got another group of inmates that are on the serving line, and they know maybe that Sergeant Stanley, who works Cell Block 6 all the time, starts [67] out on Tier 3, and he feeds from left to right. Well, he's actually counting the number of cells and counting the number of trays, and he's concealing that contraband or that weapon in that particular tray to get to that inmate. And from there, it can exchange hands. I just took the liberty of bringing one small thing that you may not consider to be a weapon, but certainly it is given the gravity of what can be introduced into the institutions. It's

something as small as a SIMS card. And this is it. And certainly, this can be concealed just about anywhere, as well as a beard. And this is what makes the whole thing magic, this is what makes it work. And I have seen phones altered in so many different ways without battery packs, where they've taken AA batteries and wrapped them up to charge and work the phone, pieces of phones that have been walked down the hall in flip flops that have been put together later on in an ad seg, in general population. It's amazing how creative you could get. Something this simple can be responsible for the introduction of drugs or weapons into any institution. And I just felt like I needed to miss – miss that point, because at this point I don't know that we've really addressed that.

Q Okay. Let me – let's get back to the concern that – or the request that inmate Muhammad has, and that's the request to have a one half inch beard.

A Sure.

[68] Q Do you have any concerns now as a former warden, current assistant director of the Department of Correction, that something such as the SIMS card that you brought with you today could be confiscated – or could be hidden in a beard?

A That could be the piece of the phone that makes it all work. Certainly. As well as the needle off of a syringe and the diabetic inmate that's in ad seg that acts like he's putting the cartridge or the base of the syringe in the sharps container, pulls it back out, that maybe the syringe got broke off before it was

placed in the sharps container, well, he passes that to the guy that's got the needle in the next cell. I mean – I mean, the possibilities are flammable, really.

Q And again, there has been testimony today with regard to all the various different places that you – that an inmate can hide or conceal contraband. Do you disagree with any of the testimony today with regard to the different various places that inmates can conceal contraband?

A No, ma'am.

Q Does that alleviate your concern with regard to an inmate who is requesting to grow a half inch beard?

A I'm very concerned about a half inch beard.

Q Okay. Are you responsible for preparing or for changing any of the Arkansas Department of Correction policies?

A I'm a member of the policy committee itself. There's a number of members, including our lead staff attorney, who is [69] actually the chair of the committee, so I do have direct input into the policy and change, yes, ma'am.

Q Okay. The Court inquired earlier with regard to the department's policy on grooming. Did you actually bring a copy of the grooming policy with you?

A I did. I have that in front of me.

Q Okay. What is the policy number?

A The actual policy is a – it's an Administrative Directive, and the number is 98-04, and it deals with the reference to the Administrative Regulation of personal cleanliness and grooming for inmates.

Q And in looking at the policy, would you please refer to the part that makes reference to the length of hair that an inmate may have?

A It's probably the closest thing to that, it states:

> "Inmate's hair must be worn loose, clean, and neatly combed, no extreme styles are permitted, including but not limited to corn rows, braids, dread locks, mohawks, et cetera. The hair of a male inmate must be cut so as to be above the ear, with sideburns no lower than the middle of the earlobe, and no longer in the back [70] than the middle of the nape of the neck."

It also talks about the aspect of the medical script for a dermatological problem as well.

Q I asked Warden Lay earlier if he had any concerns, not even just with regard to inmate Muhammad, but any inmate that is allowed to do something that other inmates are not allowed to do.

A That's the last thing that you would want to happen in an institution. As Warden Lay pointed out earlier, you know, certainly it can make them a target with some of the inmates in the population, but it could also try to – it could also elevate his status and

make him even possibly even more sought after by other inmates who are looking for a leader and who want to follow.

Q Does that cause any concerns to you as a member of the security staff or security team with the department?

A Certainly, it does. If you're in the business of recruiting or anything like that, it all – that all has a bearing on that.

Q And again, I know that Warden Lay was able to testify with regard to his concerns at the Cummins Unit where he is currently the warden. Do you have any concerns department-wide with regard to whether or not an inmate or possibly other inmates were allowed to wear the half inch beard?

[71] A I have that concern for us as an entire department, at every institution.

Q Are you aware of what other states are doing, how they run their facilities, or what types of rules that they have?

A No, ma'am, not specifically. I'm really not.

MS. CRYER: Your Honor, I think that's all the questions that I have of Mr. Harris.

THE COURT: Do you want to make the grooming policy a part of the record?

MS. CRYER: I would, Your Honor.

THE COURT: All right. Any objection? I don't know that it would be a viable objection, but you can make an objection for the record.

THE PLAINTIFF: No objection.

THE COURT: Okay. Why don't we make that – if you need that back, we can make a copy and give that –

THE WITNESS: That's fine, Your Honor.

THE COURT: Okay.

MS. CRYER: And if I'm not mistaken, Your Honor, I believe Mr. Muhammad may have attached a copy of the policy, the 98-04, to one of his pleadings. I'm not positive that he has, but for some reason I was thinking that he had previously.

THE COURT: Okay. Well, I'll make it a part of the record here, we'll call it Defense Exhibit 1.

[72] MS. CRYER: Thank you, Your Honor.

(Defense Exhibit No. 1 identified and received.)

THE COURT: Do you have questions of the director here?

THE PLAINTIFF: Just a few.

CROSS EXAMINATION

BY MR. HOLT A.K.A. MR. MUHAMMAD:

Q I just have a few questions for you.

A Sure.

Q You made the statement about the – the AD 98-04, correct, regarding the policy for the head hair?

A Yes, I did.

Q In that policy, it doesn't state any type – any particular length on the head, does it?

A No, it does not.

Q Okay. And also, in this case, this particular case we're talking about now, have you been made aware of any – any attempts at targeting me, because I was walking around in the halls at Cummins Unit with a beard, by other inmates?

A No, I have not.

Q And you haven't been made aware of any other – of any information come to your attention about anybody trying to seek me out as a leader because I had a half inch beard on my face, or have you been made aware of anything like that?

A No, I have not.

[73] Q Okay. Again, you brought out the thing about the SIMS – the SIM card, I believe. It's – again, there's more ways to move contraband in a prison, I reiterate in a prison, than just the facial hair, correct?

A Yes, that's correct.

Q And you are also aware that in any given institution, that there are officers that will move contraband for inmates and routinely do so?

A I don't know about routinely, but we have dirty staff as well as dirty inmates.

Q So if an inmate wanted contraband or weapons moved, instead of putting it in facial hair, they could give it to a CO that they paid some money to, or they'd have a homeboy on the street that they could use that to get it – to move it around and get it within the institution, correct?

A That would be a possibility.

Q And, in fact, officers do that, right?

A There are some staff.

Q Okay. I believe – let's see here.

THE PLAINTIFF: Can I have just a minute, Your Honor?

THE COURT: You may.

BY MR. HOLT A.K.A. MR. MUHAMMAD:

Q Now, as far as the issue of inmates wearing beards in the Department of Corrections, would it be, again, I ask you, fair to say that not every inmate in the Department of Correction [74] is going to grow a beard – is going to grow a beard?

A I really don't know. I don't think I can answer that.

Q Or whether they can or not, you don't – you don't have an answer one way or the other?

A I really don't.

Q Okay. As far as prisoner identification goes with respect to – because I know that's an issue – again, you all have ID cards that are issued to inmates to readily identify them by staff, correct?

A That's correct.

Q Okay. So if a – if someone, let's say, for example, should the grooming policy be changed to allow a half inch beard, would – would it be a problem to require inmates coming into the Department of Correction to be clean shaven with their first photo taken, and after a half inch beard has grown, retake another photo for comparison purposes?

A Well, I think Warden Lay answered that when you asked him that same question earlier. But again, what you have to consider is the aspect of that beard being used to conceal weapon – weapons or contraband, to have that contraband introduced into a facility.

Q Now you've mentioned about a quarter inch beard, some stuff has been made about that, about the quarter inch beard. Is it not a fact that some people grow a quarter inch beard thicker than others do?

[75] A You know, again, I – I'm not really sure how to respond to that. Everybody – everybody's facial hair is different in that regard.

Q But the ADC specifically has a policy governing a quarter inch beard for dermatological or skin condition, correct?

A Yes, that's correct.

Q So I ask you, sir, how then is a quarter inch beard for dermatological reasons not a security threat given – again, given that it's been stated that people can grow different – a half inch beard can be one way on one person, different on another, where a quarter inch beard would be the same way, explain to me how that is not a security threat, but a half inch beard is?

A A half inch is longer than a quarter inch.

Q But again, the question is how is one if – if the Court – if your policy is to stop the moving of contraband and weapons in the facility, and your main objection is that the facial hair is the conduit to do so, to move it around the facility or whatever, then explain to me how a quarter inch beard is going to be any different than a half inch beard.

A The last time I probably walked one of my institutions was before the holidays. The quarter inch beards, you know, primarily, you can still see the skin.

Q And you're saying a half inch beard, you wouldn't be able to do that?

[76] A I don't think so, no.

Q But again, a quarter inch beard, again people can grow at different lengths, right?

A Sure, everybody's hair is different.

Q And a quarter inch beard can have – one person can have a quarter inch beard that's thick, the next person can be one that sees the skin; would that be an accurate statement?

A I didn't hear the last part. I'm sorry.

Q I said a quarter inch beard, someone growing – one person growing a quarter inch beard might grow it thicker than somebody else, where you can see the skin on him, but you can't see it on the other person. Would that –

A I suppose that's possible, sure.

Q So they could hide contraband in that, too, right?

A That's a possibility. But again, the quarter inch is – beards that I've seen, the skin is showing.

THE PLAINTIFF: Okay. That's all I have.

THE COURT: Redirect?

MS. CRYER: I think I just have one.

REDIRECT EXAMINATION

BY MS. CRYER:

Q So, Mr. Harris, if you have inmates throughout the department that are allowed to grow one half

inch beards, and presumably some can grow thicker beards than the other, how – how, as part of the department, do you monitor the thickness [77] or what could possibly be in some of the beards, but not in other beards?

A That's almost an impossible task, you know, when you're dealing with that large of a population. And again, it's just another avenue for contraband and weapons.

Q Is it your –

A I don't – I don't know how you would do that.

Q Okay. Is it your testimony today that inmates who could possibly grow half inch beards, that's the only way that they would be able to carry or pass contraband to one another?

A Through the half inch beard?

Q Yes.

A There's many ways, ma'am.

Q Okay. The half inch beard is not just the only one?

A No, ma'am, it is not, not by a long shot.

MS. CRYER: Okay. That's all I have, Your Honor.

THE COURT: Mr. Harris, you heard the questions I asked of the warden. Do you remember those?

THE WITNESS: I do. Probably the last one, if I could go in that order, Your Honor, I haven't heard anything, any consequences or – or feedback on since what happened in California, and I'm trying to recall anything negative or positive about their grooming change, but I don't know that I can recall the first question, Your Honor.

THE COURT: Well, and you've answered it with the [78] policy here. You know, the other line of question was kind of were you aware of any – in your experience, aware of any contraband being hidden in hair?

THE WITNESS: Oh, yes, sir.

THE COURT: You are?

THE WITNESS: Yes, sir.

THE COURT: Okay. Anything recent?

THE WITNESS: No, sir, not recent, not in the two years since I've made the transition to assistant director.

THE COURT: All right. And how long have you been in the prison business?

THE WITNESS: 32 years last November.

THE COURT: And did you also start out in the CO – as a CO or –

THE WITNESS: Yes, sir, I actually worked my way up through the ladder. Corrections is my life. It's the only job I've ever held.

THE COURT: I asked my lawyer to get me a ruler. You held the SIM card up, and I thought for record purposes –

THE WITNESS: Oh, sure.

THE COURT: – can I see it and –

THE WITNESS: You can.

THE COURT: – let me get some dimensions on the SIM card.

THE WITNESS: Yes, sir.

[79] THE COURT: It looks like it's an AT&T SIM card here. And it is – it looks like it's 3/8ths inch long ways and just under 3/8ths of an inch width ways, so it's a pretty small device. I don't know if anybody has any questions that the SIM card I hold up, do you – I mean, those are the measurements I made. I think they're pretty accurate. It would be 7/16ths width – I'm sorry, that can't be right. That would be 9/32nds.

MS. CRYER: Your Honor, I don't know if it would be helpful to make a copy, to place the SIM card on a photocopier and make a copy of it –

THE COURT: We can do that if you would like to.

MS. CRYER: – for the record. I think I would, if that would be acceptable.

THE COURT: Okay. Sure. It's 9/32nds width. Looks like 13/32nds length. But we'll do that at a break, if you don't mind for us to borrow this?

THE WITNESS: No, sir.

THE COURT: We'll photocopy it on the – with the ruler.

MS. CRYER: Thank you.

THE COURT: All right. Any other follow up?

MS. CRYER: I do.

THE COURT: You may. Feel free to.

MS. CRYER: I have actually just a couple. And I [80] apologize, Your Honor, because I know I said that I did not –

THE COURT: It's not a problem at all.

MS. CRYER: – have any additional ones for him.

FURTHER REDIRECT EXAMINATION

BY MS. CRYER:

Q Mr. Harris, let me ask, do you have any concern with regard to the safety of the officers who

might be required to check what's inside an inmate's beard?

A Well, certainly, you do. I mean, from the standpoint of syringe needles, the safety razors that are issued, you know, they break up – some break up better than others, even a small – the smallest piece of a razor and getting – getting a wound from that, getting a cut, those are all concerns.

Q And again, do you have the same concern with regard to the safety of officers if they are checking for contraband inside an inmate's hair?

A Certainly, I do.

Q Does the concern amplify or increase if the officer now has multiple places on the head that they are to search, not just one?

A Yes, that's a concern, certainly.

MS. CRYER: Okay. Your Honor, that's all I have.

THE COURT: Any follow up?

THE PLAINTIFF: Yes, I do. I've got a couple.

RECROSS EXAMINATION

[81] BY MR. HOLT A.K.A. MR. MUHAMMAD:

Q You allow inmates in the Department of Correction to grow a mustache, right?

A Yes, that's correct, as long as it doesn't drop below the corners of the mouth, as it's outlined in the policy.

Q Is it not a fact that some people grow thicker mustaches than others?

A Probably so, yes.

Q Could you not hide that SIM card right there in a mustache just as easily as you could a beard?

A It's possible, sure.

Q So, and then, let me ask you about this here, the – about officers reaching in the beard of being exposed to sharp objects or things of that nature, you're worried about security issues regarding that, correct?

A I'm worried about the safety of the staff as well as the inmate population.

Q But an inmate – an inmate in population could actually – would be – could actually conceal weapons on their person, be more of a threat than somebody having something in their beard, wouldn't you say?

A No.

Q Be more likely to conceal on their person instead of their facial hair, right?

A Not necessarily, no.

[82] Q You don't believe that?

A No.

Q So other institutions that do this, that these officers are doing this at other institutions, especially the one in California, these officers are actually doing that, what do you say to that?

A I'd say I've never been impressed with the California system.

Q But if they're able to do it, then you – the Department of Correction could do it just as easily, right?

A No, I wouldn't agree with that. You know, again, from the standpoint – and I want to make sure that I key in on this – is that you're talking about the safety and the security of the institution, and what our primary mission is, and what we're trying to prevent from coming into our institutions, and that's weapons, that's guns, that's meth, that's crack, and it goes on and on.

Q But a lot of that stuff is brought in via your officers, aren't they, sir?

A And so much of that is also brought in by inmate visitors.

Q That's correct, too, I would agree with you on that. But there's many different ways for it to come in, other than just put it in the facial hair?

A Yes, we've addressed that question already.

Q And the – really, the issue about the facial hair is not [83] really about security, is it?

A Certainly, it's about security.

Q So would you have your – the officers at these institutions that are – that are harassing inmates going down the hallway for some stubble on their face, the stubble does not represent a security threat, does it, sir?

A I don't know about your allegation of harassment.

THE PLAINTIFF: Okay. That's all I have.

THE COURT: Anything further?

MS. CRYER: No, Your Honor.

THE COURT: You may stand down, sir. Thank you.

THE WITNESS: Thank you.

(Witness stands down.)

THE COURT: Do you have anything further, Ms. Cryer?

MS. CRYER: Your Honor, I don't believe so. I have several witnesses that would be here that could testify with regard to the Islamic religion and what is required and not required, and I really don't think that that is a central focus of the hearing today. And I do have Deputy Warden Weekly that is here. She is in security, although she was really brought

here just with regard to a disciplinary that inmate Holt was issued and was complaining about or had raised in one of his motions. But because he really hasn't gone into that today, I don't think there's really any need to put her on the stand. And I think her security concerns would just [84] overlap what Mr. Lay and Mr. Harris's concerns have been.

So, a long way to say, no, sir, I don't believe I have any other witnesses.

THE COURT: All right. Thank you, ma'am.

Do you have anything further, Mr. Muhammad, that you wanted to present?

THE PLAINTIFF: No, sir.

THE COURT: What I'd like to do is I'd like to take a brief recess and put my thoughts together. And, you know, I'll have a written ruling, but I'd like to make a preliminary finding, just that's how I try to do my business, I try to let people know when they walk out of the courtroom kind of what I'm thinking, so later I don't issue a written ruling and pull the rug out from under you.

Ms. Cryer?

MS. CRYER: I was just going to ask for permission, Your Honor, to make a brief closing argument, if I may?

THE COURT: You may. You may. And so may you, Mr. Muhammad.

MS. CRYER: Do you want to let Mr. –

THE COURT: Well, you know, it's kind of your burden, Ms. Cryer, I think, so if you want to go first. Well, there again, yeah, it makes no difference, but I'll let you all speak, and if at the end of each turn if there is something burning on your mind, I'll let you have a rebuttal. How about [85] that?

MS. CRYER: Okay. Thank you, Your Honor. I will be brief.

Your Honor, the current grooming policy of the Arkansas Department of Correction is Administrative Directive 98-04. It is the same policy that was valid and in place in the *Michael Fegans* case that was decided by Judge Moody back in 2006 and affirmed by the Eighth Circuit in 2008. There is not anything that has changed since the findings in *Fegans*. The grooming policy has not been found to be unconstitutional. If I'm not mistaken, I don't even believe that Mr. Holt is arguing that the policy itself is unconstitutional. He just says that there should be an exception made to him because he wants to be able to grow a half inch beard.

I find that Mr. Holt or Mr. Muhammad's testimony is in a way contradictory in and of itself. In his pleading, he indicates that it is his religious belief that he not be required to trim his beard at all. And yet based upon a 2004 Ninth Circuit decision, Mr. Holt therefore says, well, I'm willing then to consider it and to compromise.

Well, if his position is that he shouldn't have to cut it, then that should be his position, he doesn't have to cut it. What he's doing is saying that I'm agreeing to cut it half an inch, that the – that the entity that he prays to will see that he has tried to follow the laws, has done the [86] best that he can, and even if he was being restricted from doing so, it's still going to be okay.

The defendants' position would be that the same applies for even if he is required to comply with the Department of Correction's grooming policy and to completely shave his beard.

And the law that he cites to is a 2004 decision. The counsel for inmate *Fegans* in 2006 argued Ninth Circuit, as well. And while their religious beliefs were different, Michael Fegans was a follower of the House of Yahweh, Mr. Holt is a follower of the Islamic faith, essentially, Your Honor, not to compare the two religions, but essentially it's the same argument, take the religious nature out of the name of what you're going to call the religion and it's the same religion, it's the same argument. Nothing has happened between the 2006 decision in *Fegans* continuing forward to 2012 today.

The testimony that was offered by both Mr. Lay and Mr. Harris was that the carrying of contraband and the issue and concerns of contraband has increased from 2006 forward through today. So it's not a matter of the department is not concerned or no longer concerned about – about the security and the

contraband, they simply see the – making the allowance for a half inch beard is yet one more avenue in which an inmate, whether it's Mr. Holt or whether any other [87] inmate in the Department of Correction, could possibly carry in contraband.

They seemed – or they – it appears that Mr. Holt has offered to say or is implying that he won't try to hide contraband in his beard. And unfortunately, an inmate making that statement, who is serving a life sentence, who really doesn't – plus 40 years, who really doesn't have anything to lose, Your Honor, just isn't good enough. If the administration could take the word of every inmate, again, no particular disrespect to Mr. Holt, but that just can't happen. And the question becomes where do you stop? There has been an increase in the introduction of various other forms of contraband, and clearly, the department's concern is valid based upon those security reasons.

The testimony, Your Honor, has also been that inmate Holt has a number of other options and avenues and ways of exercising his religious beliefs. He's able to pray. He's able to possess a Koran. He's able to get a spiritual advisor. He's able to have a religious diet. He's able to acknowledge all of the religious holidays that he wants to. He's able to have a prayer rug. He could do all of these different things in practice of his religion. But to say that by not being allowed to have a half inch beard or else he can't – he can't practice his religion, falls flat on the other arguments that he's made, Your Honor.

[88] And I would respectfully say that the grooming policy has not been found unconstitutional. The *Fegans* case has not been overturned. We follow Eighth Circuit law. We are in the Eighth Circuit.

While Mr. Holt may try to bring in Ninth Circuit case law, essentially, Your Honor, been there, done that, nothing has changed. And, if anything, the evidence presented shows that there is more security concern in 2012 than there was in 2006. So we respectfully ask that the order that is currently in place with regard to the temporary restraining order be removed or lifted and that Mr. Holt be required to comply with the grooming policy.

Thank you.

THE COURT: Thank you, ma'am.

Mr. Muhammad?

THE PLAINTIFF: The issue here is about whether or not the Department of Correction's policy is the least restrictive means of allowing me to practice my religious beliefs.

While the Ninth Circuit – while the defendants here may knock the idea of bringing in Ninth Circuit law, it's still considered persuasive law in this case. The facts are the same. The policies are the same. The institutions there instituted these changes. Whether they've had problems or not, the defendants haven't been able to say one way or the [89] other.

We've heard that you can get contraband in the facility in any number of ways. In fact, they stated that from 2006 to 2012, that the increase in contra – they feel contraband has increased. Well, I would submit to Your Honor during 2006 to 2012, you were required to shave your beards. So that – that would – that falls.

And then the fact that if – if they're worrying about the grooming policy causing the flow of contraband into the prison, then what – what has been the issue for the past six years when there was a grooming policy that said you had to shave your beards?

In the *Mayweathers* case, and in others in the Ninth Circuit, as well as in New York, the same argument was made that the defendants have made here today. In each of those cases, the courts have ruled that that's not enough, that having a concern about a beard altering identity, hiding weapons, things of that nature, the courts have rejected it. It's even been appealed to the U.S. Supreme Court. The U.S. Supreme Court rejected review. And I believe that you, Your Honor, should take that seriously into consideration. And it's a recent case. It might be seven – six, seven years old, but it's still a persuasive law case.

On top of everything else, again, I reiterate *Michael Fegans* argued unrestricted hair growth, unrestricted beard [90] growth. I am not arguing that – that having unrestricted hair, unrestricted beard does not present a security threat, because it does.

What I am arguing is, is that a half inch beard – we can get all day into about SIM cards being hid, but we heard – we heard Mr. Harris say that you could hide one in a mustache. And there is people walking around there you see with thick mustaches that you could hide stuff in.

The bottom line is that should you allow this injunction to continue it would not affect the other inmates in the Department of Correction. It only affects me at this point, just like it has been. It's been established that even if other inmates were allowed to grow beards, they couldn't state with a degree of certainty whether or not that people would grow beards or not. Some people can't grow beards. I'm sure you're aware of this. Some people physically can't grow beards. Some don't want to because of – because it itches their face and things of this nature. So they're not going to have to worry about 15 to 16 thousand inmates walking around with beards on their faces.

The issue here is whether this is a least restrictive means to practice my religion.

Regardless of whether I have a Koran, regardless of whether I have Sujud, the prayer rug, whether I have access to religious advisers, which is very rare at Cummins Unit, it still doesn't answer the question of whether or not imposing [91] the punitive sanctions on somebody at the risk of forcing somebody.

In the *Warsoldier v. Woodford* case, the court there rules that these type of restrictions, these type

of punitive sanctions cause somebody to have to – to choose between following what the state says they should do and following what the dictation of their religions say they should do and having to decide what they're going to do in that situation.

In fact, it was even argued in the *Mayweathers* case that it's either a issue of following Allah and the Sunnah or following what the state says. And the Ninth Circuit found, and so did the U.S. Supreme Court when they denied review, they found that – that this issue here, that having all of that was still was burdensome, that having – that forcing Muslims to shave their beards or whatever is – was burdensome on the practice of their religion. And the state has not – the state has not – has not held with that, has not answered it.

Whether or not people bring – bringing in weapons, contraband, or whatever, they're going to do that. They're going to do that. And I submit to you that a half inch beard is not going to cause any significant increase in the flow of weapons, or what have you, into the facility. It's been established that corrections officers bring it in, it's brought in through visitation. And at this point in time, at [92] visitation, you have to shave. So they're not transporting it in a beard to get it out of the visitation room, they're transporting it in there [sic] clothes or secreting it on their person in a body cavity somewhere. So I believe that argument shouldn't hold water either, because if you're going to hide a weapon on you, the facial hair, if it's long, maybe, but again, a half inch beard, I mean,

come on, Your Honor, I mean, it's – it's preposterous, you know, to say that you have to – you have to cut this, but this up here, well, we don't really have a policy about that, about the length of it, it just has to be loose and neatly combed. You understand what I'm saying?

So I'm asking you take all this into consideration and look at it for what it really is, for what this policy really is about. And I would ask you to continue the injunction as it applies to me, as it applies to me at this point, allow me to continue to grow a half inch beard. And whether I'm an inmate or not, I'm still a man, I'm still a Muslim, and these people have not shown that I've been deceptive in any way, and when I give my word as a Muslim, I fear Allah that much to tell you that I'm not going to do stuff like this. I may have a life sentence, but I do have something to lose. I do have something to lose because all of my appeals, Your Honor, haven't run out yet. I could still face freedom. You understand what I'm saying? And I'm not [93] trying to jeopardize that with some – with some foolishness such as this. I'm doing this for my religious beliefs.

And the fact is nobody disputes that they're sincere. That's something else you must weigh, the sincerity of that belief. And I've given you – I've given you Sunnah, I've given you Hadith, there is no question that a Muslim is to trim the mustaches short and leave the beard as it is.

Now, Ms. Cryer over here made reference to the fact, well, I said that I would – that I believe that the

beard should remain uncut. As I pointed out to you once before when I was on the stand, the Hadith says that if you intend to do a good deed and you don't do it, it's still credit to you as a good deed. The fact of the matter is, is that I have made an effort to comply with certain tenets of the religion as it relates to the beard, and to do so, and to do that, I've been willing to compromise. I've been willing to compromise as far as the length goes. You understand what I'm saying? But I'm still following the Sunnah of the Prophet Muhammad, sallallahu alayhi wa sallam, and it stands uncontroverted because the defendants have not chosen to answer it.

And I ask that you allow the injunction to remain in place.

THE COURT: Thank you, sir.

Rebuttal?

MS. CRYER: I do, Your Honor. I'm going to start [94] with the last one. Inmate Holt says that he has stated for us, and that it is cited throughout his religion, that if you intend to do a good deed, but that you're not able to, that it's okay. That's exactly the argument that we have made today, Your Honor.

Mr. Holt says that he intends to do the good deed by trying to let his beard grow. The Department of Correction says no, he should not be allowed to do it. According to his own reasoning that he just got finished explaining to this Court, that should be okay, according to his religion and according to everything

that he's stated today, according to him, that should be okay.

Mr. Holt said that the growing the half inch beard only applies to him and if the Court is allow – to allow the temporary restraining order to continue with the order, that it would only apply to him. I refer the Court to docket entry number 44, which was filed on November 17th, 2011 by inmate Holt, in which it is his second motion for leave to amend, in which he is seeking to add a number of other inmates into – into the case. So, clearly, he's not seeking for this order or for anything in this case to simply involve just him.

He makes reference, Your Honor, and argues the *Mayweathers* case out of the Ninth Circuit. Your Honor, in looking at page six of 11 of that case, it states that:

> "Defendants assert that the [95] grooming regulations are necessary to identify inmates for the purpose of preventing escapes and controlling movement within the prison. Defendants also submit that the beard of any length changes the appearance of a prisoner and compromises the process of identifying inmates or escapes and that officers need to quickly identify inmates to prevent assaults, riots, or disturbances."

I don't believe, Your Honor, that the *Mayweathers* case addressed anything with regard to contraband and the possible carrying and continuing on of contraband being passed from one inmate to another, from it being passed down the hall, as well as the

security concerns, even the health concerns with regard to the officers who may have to check it. There is absolutely no dispute that unfortunately contraband does exist within any prison setting.

I do think that it's reasonable for the defendants to at some point have to say – or for the department to say at some point we have to stop here, we have to limit what can be done. Inmate Holt wants a half inch beard. What's next? [96] Another inmate comes in and says I need a one inch beard. Another one comes in and says that I need a half and a – a one and a half inch beard.

And, Your Honor, I know that inmate Holt has made reference to a violation of the policy and that he could catch a disciplinary for not complying with the policy. That's correct, Your Honor, he can, but that's also true for any rule violation within the Department of Correction. It is not simply restricted to the grooming policy.

And lastly, inmate Holt made reference, too, that he is not deceptive, that he has not tried to deceive anyone. Well, Your Honor, he may not as of this point – in his one and a half years within the department, he may not have tried to or have deceived anyone that we're aware of. However, Mr. Holt's own behavior with regard to just recently the behavior that he exhibited towards the inmate barber who cut the hair, according to him, too short, which inmate Holt said that they were then at war, and yet he said that can be interpreted in many different ways, I'm not

sure how else to determine or decipher the phrase "at war." So while he may not be deceptive, he clearly is showing tendencies, for a better phrase, not being able to get along with others. That does create security concerns throughout the department and it will continue to create security concerns throughout his incarceration with the Department of Correction.

[97] THE COURT: Response, Mr. Muhammad?

THE PLAINTIFF: Again, I refer back to the decision in *Mayweathers* that the defendants just finished referring to. They may not have – we don't exactly know all the reasons the California Department of Correction had for having the grooming policy. The main one here that was addressed was about altering your appearance in the event of an escape.

And if you look at page six of that particular decision, under the compelling interest, least restrictive – least restrictive means, the district court in that case, and they cited some other cases that dealt with it out of different circuits, the Second Circuit, District of Arizona, and things of that nature, they were arguing in this case, and in fact the defendants have argued here today about altering appearances. They have gotten up here and said that, that they were concerned about this type of thing. So I go back to this, and which if I may, Your Honor, read – read here what was said in this – in this order handed down by the Ninth Circuit, and it says that:

> "Defendants' rationale that an inmate with a beard can more easily alter his appearance after he escapes is not persuasive. Common sense and experience recognizes that a prisoner may not [98] only shave, but alter his appearance in any number of ways to evade authorities after escape. Moreover, while it is plausible that altering a six inch beard or cutting very long hair may assist an escapee to elude capture, I must agree with Judge Strand that shaving a half inch beard likely cannot."

And then it cites *Luckette v. Lewis,* and which it said:

> "Prison officials do not meet their burden of demonstrating a compelling interest for not allowing a short, kempt beard."

In *Fromer v. Scully,* they also cite this case, as well:

> "It is certainly not irrational to believe that a full beard, which may well extend for significant lengths sideways from the cheeks as well as downwards from the chin, may impede identification more than a one inch beard."

[99] And as Magistrate Judge Moulds concluded:

> "When it comes to changing ones appearance through the growth or removal of hair, this court finds that not all beards are equal."

You understand what I'm saying? And this here, he specifically addresses some of their concerns that they got up on that stand and told you today, altering appearances. It's – I don't want to be in any way disrespectful to these men, but at times it sounds like they're changing horses in midstream because, at first, their first argument was, throughout the Administrative Remedy process, that hiding weapons or contraband in the facial hair is the reason – the reason that inmates are not allowed to grow their beards in the Department of Correction. Now we're hearing stuff about altering appearances. Now we're hearing –

THE COURT: Well, Mr. Muhammad, I didn't perceive that. I perceived that to be a two pronged approach on what they said it was. It was both of those reasons, which, I mean, it frankly is a problem for you, Mr. Muhammad, because that's what the *Fegans* court analyzed. I mean, I understand the Ninth Circuit rejects the alteration of appearance point, but, you know, *Fegans* partially hangs its hat on that issue. So, I mean, I don't – I've got to study up on it a little bit more here in a minute, but it seems to me that *Fegans* says [100] it's – it's the risk of contraband and it's the risk of being able to alter your appearance should you escape. I mean, like I say, I understand that's what the California court in the Ninth Circuit have held, but, you know, that's in contradiction to what the Eighth Circuit has held. The Eighth Circuit is more persuasive in this court.

THE PLAINTIFF: I understand that. What I'm saying is this, when it's all said and done, the fact that requiring people to cut their beards is not going to dramatically alter the flow of contraband into the prison. It's not going to. They even said the past six years it's been coming in an increase in it. Having a beard is not going to cause that increase any more than what it already is.

And you heard testimony that a quarter inch beard can be grown the same way, it can be some on one – one, on one person, and different on another. The same for a half inch beard. If one can be, they both can be.

You heard testimony that a thick mustache could hide some contraband in it, but they're not required to shave the mustache off. What I'm saying is, if – if we're going – for consistency's sake here, I mean, let's look at it for – for what it is.

THE COURT: This is supposed to be rebuttal, I want you to stick to – if you've got anything else, you've made an argument already and you're kind of going back to making [101] another argument. It's –

THE PLAINTIFF: I understand, Your Honor.

THE COURT: Okay. I hear your points, Mr. Muhammad, and they're good ones. And so I've got to go and get my thoughts together and let you know where I'm coming from.

THE PLAINTIFF: There is one other argument I want to address that Ms. Cryer made. She

made the comment regarding the fact that about the – the injunction applying just to me at this point. First off, the Court hasn't ruled on class certification. It had –

THE COURT: Let me speak to that right now, Mr. Muhammad, because it seems to me that these are individual – and again, that was a mistake I made, was, you know, these are individual cases, and I think the court in *Fegans* requires me to individually look at the cases. I mean, the testimony may be exactly the same, but it may not be. And so, my reading of *Fegans* and my preparation for coming out here today leads me to conclude that, you know, it would be improper to let defendants [sic] add on to your case. Your case is a particular case and I think the analysis has to be on each particular claim. So I think that those defendants [sic] are going to have to file their own cases. And I understand that, you know, some of them may be similarly situated, some of them may not be. I think that was the argument in response, was that they may not be. But I think that they're going to have [102] to file them independently.

Yes, ma'am?

MS. CRYER: You just said defendants. I wanted to make sure –

THE COURT: I'm sorry. Plaintiffs.

MS. CRYER: – we're talking about –

THE COURT: I'm sorry. Yes, ma'am.

MS. CRYER: I just wanted to make sure. Thank you.

THE COURT: Plaintiffs.

MS. CRYER: Thank you.

THE COURT: So I'm pretty sure I'm going to have to deny your request for these additional defendants [sic] to come in, because I think they're going to have to plead their own cases and we're going to have to look at them individually, because that's – that's how I read *Fegans,* and the law, you know, the RLUIPA is a case by case analysis, and it's – again, it kicks the burden back to the defense to say here are our legitimate penological aims nere, and then, you know, again, as you point out, is that the least restrictive means to the ends that they're trying to achieve.

THE PLAINTIFF: I would say then that the only – the major difference between myself and *Fegans* is, again, I'm not arguing an unrestricted hair growth, unrestricted beard growth. I can understand where the state would have a security concern with that. I agree with that.

[103] We're talking about a half inch beard. And that's – that's what I –

THE COURT: And I hear your point loud and clear and it's a good one.

THE PLAINTIFF: Thank you, sir.

THE COURT: All right. Well, if you all will give me just a few minutes and I will come back with just some preliminary findings. And then, obviously, you know, the way it works is whatever ruling I make, it goes to Judge Miller for his adoption or rejection, and then you all would have a chance to, you know, respond to my ruling, and then he ultimately gets the say so, and then you would have a right to appeal his ruling.

Yes, sir?

THE PLAINTIFF: Can I ask you one question?

THE COURT: You may. You all be seated, please. Please have a seat.

THE PLAINTIFF: Depending on how you rule, if this is – if this is a recommendation to send to Judge Miller, correct, what would be the binding ramifications of it at this – at this point in time, if it's up to Judge Miller to accept or reject, and he would have the ultimate say, what would be the binding, at this point in time, between now and when he makes a ruling on it, where would that stand? That's all I'm asking.

[104] THE COURT: Well, I'll address that, Mr. Muhammad. I'll address that. All right?

THE PLAINTIFF: Okay. Okay.

THE COURT: All right. You all rest easy, please, I'll be back in a few minutes.

(Recess.)

AFTER RECESS

THE COURT: All right. We're back on the record.

And Mr. Muhammad, Ms. Cryer, you know I did a lot of research before coming out here because I think this is a pretty – pretty close call in this case and I think the case law right now as it stands is, you know, somewhat in a state of flux with specific regard to beards, with what happened in the Ninth Circuit and then this Eighth Circuit case with the dissent from Judge Melloy makes it pretty interesting.

But for today, I'm to consider four factors. One, the threat of irreparable harm to you, Mr. Muhammad, if I don't grant your request for an injunction. The state of balance between the harm and the injury that granting injunction will inflict on the other party litigants. The probability that you will succeed on your merits. And the public interest. So those are the four factors for the immediate issue.

You know, Mr. Muhammad, I don't think it would be irreparable harm to you if you were forced to comply with the [105] grooming procedure until you were ultimately to win, if you're able to do so, so I think that probably favors the defense. Although I do understand – you know, your religious principles are not lost on me, and the issues that you've raised; however, as you stated yourself, and you admit that, you know, the fact that you're willing to try to do right by your religious principles, you still get credit for that. And certainly, you have done a lot. You've

been very effective in this case. And today, you know, your arguments are right on point and, you know, you have – you have done great things in order to achieve your ends on being able to grow your facial hair. So you should, obviously, get big credit for that in your religion, because you have done a good job.

In the state of harm and the injury in granting what, in granting it – what granting injunction could inflict on the other party litigants, and then I think that also goes with the probability of succeeding on the merits, and that's where I really think the – the issue lies, or the most important part of this case is, are those two factors. And it ultimately has to do with the concepts of safety, security, good order and discipline. The fact that I am obligated to, by Supreme Court law, and the other precedent out there, to give deference to prison officials in running prisons, and the fact that the *Fegans* case is from the Eighth Circuit and is very, very closely on point, and you've done a good job, Mr. [106] Muhammad, of distinguishing the fact that you want the half inch, that *Fegans* was arguing for a more – more freedom in growing his beard, but the principles are still the same. The principles are, as I said, deference to the prison officials if they're able to state legitimate penological needs. And I think they have done so. And I think they've done so, and I think that when you look at *Fegans* with the facts in this case, and ultimately, the analysis that the Eighth Circuit, the majority, used in order to come to the conclusion that they did, it's really – I'm really constricted by that – by that holding. Okay.

Mr. Muhammad, and the holding is that they're able to come in, they're able to articulate reasonable security issues. You know, albeit looking at you and your beard, and as your Ninth Circuit case says that not all beards are alike, or maybe that was a district court case, you know, I look at your particular circumstance and I say, you know, it's almost preposterous to think that you could hide contraband in your beard, but there's a bigger picture here, and I think that the law is that they get deference, and if they're able to articulate that there is a concern, and even the *Fegans* case says it doesn't have to be that the concern has actually materialized. Okay? It's a – it's a concern based on their experience and their knowledge, which is pretty particular, and in this case here we've got more than 60 years of prison experience, starting from the ground, all the way to [107] the top.

And so, I do give – I do give credit to their testimony. I was impressed by Mr. Harris with the SIM card and I do – I'm very aware of the issue of cell phones and the fact that the SIM card is a very important piece of the puzzle when talking about smuggling in cell phones and SIM cards into prison. And it's a very – a very well made point that I think I have to consider strongly in their favor.

The good order and discipline. You know, again, I'm not in the prison administration business. They've articulated legitimate reasons to state that it is actually necessary to have this grooming policy.

And also, Mr. Muhammad, you know, you bring up the point, and it's a good one, that is it the least restrictive means. And *Fegans* squarely addresses the – it's the exact same testimony, it's the exact same analysis, and so while you make a really good argument, Mr. Muhammad, I – I am very much constrained by the holding in *Fegans*. I think that I would be, you know, not doing my job if I didn't apply *Fegans* as persuasive authority that tells me exactly what I have to do in this case. And I could look to the Ninth Circuit case because, you know, the Ninth Circuit case goes your way, and it comes up with a very different conclusion, but that's not my job; my job is I've got to hold with the Eighth Circuit. And until they say otherwise, I'm constricted by that holding. [108] All right.

And again, I mean, not that I – I'm not trying to say here that I am in disagreement with the holding in *Fegans,* because I do believe, again, as I came out here straight out and said that, you know, I find myself in a very difficult position in a case like this because, you know, it is not my expertise and I am not in a good – I'm not a good person to be asked to get involved in prison administration, and so I do agree that the defense here has brought up legitimate points, they are well taken.

And let me also say that one of the other points on *Fegans* was the – the being able to alter your appearance should you escape. And that's why I asked you, Mr. Muhammad, I felt like what they said was that it's not just the one point, the smuggling

contraband, it's both points. And I think that is an important point. While the court in California rejected that, I disagree with that. I think that that is a very legitimate concern and it's been well articulated by the defense.

And so, I'm going to find that based on those two factors in *Fegans* that the likelihood that you could win this case on its merits, given that precedent, it's unlikely, and, therefore, I should deny your motion for injunctive relief at this time.

Now, you asked a point, Mr. Muhammad, and I want to [109] address it, you know, where does that – basically, where does that leave you today? What I will order is that nothing change from what's already occurred. What I will do is I will, as quickly as possible, enter a written order saying what I've just said. And it will go up to Judge Miller. You will have an opportunity, Mr. Muhammad, to object to anything I say in writing. And we'll give you instructions – you know how it works. And, Ms. Cryer, you can also object or supplement or whatever you want to do. And then Judge Miller will have the ultimate say so in how he wants to proceed, because ultimately he has this case, and as it proceeds, you know, and he may reject my conclusions and you may be in good business – in good stead with your injunction for the future. But those are my findings, Mr. Muhammad, and I will enter a written order saying so. All right.

Yes, sir?

THE PLAINTIFF: There's one thing I wanted to address. As part of that injunction, it stated that in my petition – because this is something that's become a real issue with me there at the penitentiary, at Cummins Unit, that – that the defendants be banned or barred from transferring me to another institution in retaliation for this litigation. It's a common tactic ADC uses to disrupt litigation. You understand what I'm saying? And I'm asking that that be entered – that that be – that that part still be specified [110] in the order, because that was part of Judge Miller's –

THE COURT: I'm going to just say whatever Judge Miller has ordered remains in effect and will remain in effect because he has the ultimate say so, so I don't know what's in that order. But, Ms. Cryer, do you want to speak to that? I mean –

MS. CRYER: Your Honor, I was just going to say, I mean, we will – we will comply with whatever the order says. My understanding is the order refers to the department, not just to the Cummins Unit. I don't think there's – I'm not aware of any talk or anything about transferring Mr. Holt to another institution. I don't see how that helps us to do that. The case doesn't go away if he's transferred and currently there is a pending – there's an order still in effect, so. And I – yeah.

THE COURT: Yeah. Like I said, whatever Judge Miller previously ordered remains in effect. I'll enter my order, like I said, as quickly as possible to

get this thing resolved for some finality, at least for now. All right. Any other points, Mr. Muhammad?

THE PLAINTIFF: No, sir.

THE COURT: All right. Ms. Cryer, anything?

MS. CRYER: No, Your Honor.

THE COURT: All right. Well, we'll be adjourned. Thank you all.

[111] THE PLAINTIFF: Thank you.

MS. CRYER: Thank you.

(Adjournment at 12:46 p.m.)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

GREGORY HOLT, ADC # 129616 a/k/a ABDUL MAALIK MUHAMMAD — PLAINTIFF

v. 5:11-cv-00164-BSM-JJV

RAY HOBBS, Director, Arkansas Department of Correction; *et al.* — DEFENDANTS

PROPOSED FINDINGS AND RECOMMENDATIONS

INSTRUCTIONS

(Filed Jan. 27, 2012)

The following recommended disposition has been sent to United States District Judge Brian S. Miller. Any party may serve and file written objections to this recommendation. Objections should be specific and should include the factual or legal basis for the objection. If the objection is to a factual finding, specifically identify that finding and the evidence that supports your objection. An original and one copy of your objections must be received in the office of the United States District Court Clerk no later than fourteen (14) days from the date of the findings and recommendations. The copy will be furnished to the opposing party. Failure to file timely objections may result in a waiver of the right to appeal questions of fact.

If you are objecting to the recommendation and also desire to submit new, different, or additional evidence, and to have a new hearing for this purpose before either the District Judge or Magistrate Judge, you must, at the time you file your written objections, include the following:

1. Why the record made before the Magistrate Judge is inadequate.

2. Why the evidence to be proffered at the new hearing (if such a hearing is granted) was not offered at the hearing before the Magistrate Judge.

3. The details of any testimony desired to be introduced at the new hearing in the form of an offer of proof, and a copy, or the original, of any documentary or other non-testimonial evidence desired to be introduced at the new hearing.

From this submission, the District Judge will determine the necessity for an additional evidentiary hearing. Mail your objections and "Statement of Necessity" to:

Clerk, United States District Court
Eastern District of Arkansas
600 West Capitol Avenue, Suite A149
Little Rock, AR 72201-3325

DISPOSITION

I. INTRODUCTION

Gregory Holt, also known as Abdul Maalik Muhammad, filed a *pro se* Complaint (Doc. No. 2) pursuant to 42 U.S.C. § 1983, alleging that the Arkansas Department of Correction (ADC) grooming policy violates his constitutional rights and the Religious Land Use and Institutionalized Persons Act (RLUIPA).[1] Mr. Muhammad is a Salafi Muslim who seeks to grow a beard in observance of his religion but in contravention to the ADC grooming policy. (Doc. No. 2.)

The undersigned magistrate judge previously recommended denial (Doc. No. 7) of Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order (Doc. No. 3) in light of the holding in *Fegans v. Norris,* 537 F.3d 897 (8th Cir. 2008) (Melloy, J., dissenting). Presiding District Judge Brian S. Miller, however, rejected those findings, granted

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[1] The Religious Land Use and Institutionalized Persons Act (RLUIPA), which will be discussed further in Section IV, provides that:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, unless the government demonstrates that imposition of the burden on that person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1.

Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order, and remanded the matter to the undersigned to hold a hearing.

On January 4, 2012, the Court held a hearing on the Motion for Preliminary Injunction and Temporary Restraining Order. After hearing testimony of two ADC officials concerning the specific rationale for the ADC grooming policy, this Court finds that the principles in *Fegans* apply and respectfully recommends that the Order granting Plaintiff's Motion (Doc. No. 28) be vacated and Plaintiff's Motion (Doc. No. 3) be DENIED. Furthermore, because one of the factors the Court considered in adjudication of Plaintiff's Motion was "the probability that the movant will succeed on the merits," this Court also finds that Mr. Muhammad's Complaint (Doc. No. 2) should be DISMISSED for failure to state a claim upon which relief may be granted.

II. FACTS

The ADC's grooming policy states:

> B. Inmates' hair must be worn loose, clean, and neatly combed. No extreme styles are permitted, including but not limited to corn rows, braids, dread locks, Mohawks, etc. The hair of male inmates must be cut so as to be above the ear, with sideburns no lower than the middle of the ear lobe and no longer in the back than the middle of the nape of the neck.

> Female inmates may wear their hair no longer than shoulder length.
>
> D. No inmates will be permitted to wear facial hair other than a neatly trimmed mustache that does not extend beyond the corner of the mouth or over the lip. Medical staff may prescribe that inmates with a diagnosed dermatological problem may wear facial hair no longer than one quarter of an inch. Inmates must present MSF 207 upon demand.

Administrative Directive 98-04 ("AD 98-04"). The purpose of the policy is "to provide for the health and hygiene of incarcerated offenders, and to maintain a standard appearance throughout the period of incarceration, minimizing opportunities for disguise and for transport of contraband and weapons." (*Id.*) An inmate's failure to comply with the grooming policy is grounds for disciplinary action. (*Id.*)

Mr. Muhammad offered a compromise and requested permission to maintain a one-half-inch beard in observance of his religion. Defendants rejected Mr. Muhammad's offer and argued that the grooming policy is necessary to alleviate security concerns.

III. PRELIMINARY INJUNCTION

A. Standard

In deciding whether to grant injunctive relief, the Court must consider the following factors: (1) the

threat of irreparable harm to the movant; (2) the state of balance between the harm and the injury that granting the injunction will inflict on the other party litigants; (3) the probability that the movant will succeed on the merits; and (4) the public interest. *Dataphase Sys., Inc. v. C.L. Sys., Inc.,* 640 F.2d 109, 113 (8th Cir. 1981) (*en banc*). No single factor is dispositive, but the movant must establish a threat of irreparable harm. *Id.* Without a finding of irreparable injury, a preliminary injunction should not be issued. *Randolph v. Rogers,* 170 F.3d 850, 856 (8th Cir. 1999). "The burden of proving that a preliminary injunction should be issued rests entirely with the movant." *Goff v. Harper,* 60 F.3d 518, 520-21 (8th Cir. 1995). The court in *Goff* also addressed the district court's role in inmate applications for injunctive relief as follows: "[I]n the prison context, a request for injunctive relief must always be viewed with great caution because 'judicial restraint is especially called for in dealing with the complex and intractable problems of prison administration' [t]he courts should not get involved unless either a constitutional violation has already occurred or the threat of such a violation is both real and immediate." *Id.* (quoting *Rogers v. Scurr,* 676 F.2d 1211, 1214 (8th Cir. 1982)).

B. Analysis

As stated above, no single factor is dispositive; however, in this instance the two most important factors are whether Mr. Muhammad will suffer irreparable harm and the probability that he will

succeed on the merits. During the hearing, Mr. Muhammad acknowledged that not all Muslims believe a man must maintain a beard. He also testified that followers of his faith get credit for attempting to follow the religious tenets. In light of Mr. Muhammad's hearing testimony, the Court finds that he will not suffer irreparable harm if forced to shave his beard in compliance with the ADC grooming policy.

Upon evaluating the balance between the harm to Mr. Muhammad and the injury that granting the injunction/temporary restraining order will cause the ADC, the Court finds that potential harm to the ADC outweighs any injury to Mr. Muhammad. During the hearing ADC officials expressed concerns regarding safety and security. Warden Gaylon Lay, Cummins Unit, testified that if an inmate was allowed to maintain a beard, the inmate could change his appearance during an escape. He posed the questions of how does one consistently determine on a day-to-day basis whether an inmate's beard is one-half-inch long and what if the inmate disagreed with the assessment of his beard.

Warden Lay also expressed concern about beards being used as a means to facilitate the introduction of contraband into the inmate population. According to Warden Lay, a one-half-inch beard can conceal razor blades, drugs and homemade darts. He also expressed concern for the effect that giving one inmate preferential treatment would have on other inmates. He suggested that inmate could become a target of his fellow inmates.

The most compelling testimony came from ADC Assistant Director Grant Harris. He also explained that the mission of the ADC's grooming policy is to prevent the introduction of weapons and contraband into the prisons and that inmate facial hair poses a security risk. According to Harris, a needle from a syringe could be concealed in an inmate's beard. He was concerned that the officers charged with inspecting the inmates' beards might be wounded by needles or broken razors. He also echoed Warden Lays' concerns about giving an inmate preferential treatment. He stated that affording an inmate preferential treatment would either make the inmate a target or perhaps elevate the inmate's status to that of a leader.

Mr. Harris further testified that an emerging threat to security at the ADC was cellular telephones. The ADC telephone system helps minimize risk because it records all inmate calls with the exception of legal calls. But inmates try to circumvent the phone system by smuggling in cell telephones piece by piece and reassembling them. He stated that a cell phone could be used to facilitate the introduction of drugs and weapons into the inmate population. During his testimony, Mr. Harris produced a ⅜" x ⅜" subscriber identify module (SIM) card from a cell phone. He explained that the SIM card was the critical piece to the cell telephone and, due to its size, a SIM card could be easily concealed in an inmate's beard.

Although Plaintiff makes compelling arguments that an inmate could easily hide contraband in many places other than a one-half-inch beard, the prison officials are entitled to deference. *Gladson v. Iowa Dep't of Corrs.*, 551 F.3d 825, 831-32 (8th Cir. 2009.) And the safety and security concerns advanced by the ADC officials are reasonable – particularly the fact that an escaping inmate could quickly change his appearance by shaving off his beard. Regardless, the concerns expressed by the ADC officials are nearly identical to those embraced by the majority in *Fegans*, 537 F.3d 897.

During the bench trial in *Fegans*, former ADC Director Larry Norris expressed concern regarding the safety and security of inmates and staff. *Id.* at 906. He explained that the ADC prohibition on inmate facial hair "keeps [inmates] from being able to change their appearance," and made it easier for law enforcement officials to track and identify an inmate following an escape. *Id.* at 906. He also said that "an uncut beard would make identification more difficult and would facilitate the smuggling of contraband. An uncut beard creates a better disguise for an escapee than a quarter-inch beard, because it conceals the contours of an inmate's face." *Fegans*, 537 F.3d at 907. The *Fegans* majority agreed that the ADC had a legitimate penological interest in prohibiting inmates from wearing uncut beards and that the prohibition was the least restrictive means available in furthering that interest. *Id.* at 907.

Mr. Muhammad urges the Court to disregard *Fegans* and instead follow the *Mayweathers v. Terhune* case from the Ninth Circuit. *Mayweathers v. Terhune,* 328 F. Supp. 2d 1086 (E.D. Cal. 2004). The Court, however, is mindful of the fact that it is bound by Eighth Circuit precedent. *See Hood v. U.S.,* 342 F.3d 861, 864 (8th Cir. 2003). Because the testimony in the present case is similar to that offered in *Fegans,* the Court finds that Plaintiff has little likelihood of success on the merits.

The public interest in this matter is negligible and does not favor either party. In sum, upon considering the four factors, the Court finds that Mr. Muhammad will not suffer any irreparable harm, the balance the harm and the injury to ADC weighs in favor of the ADC, and based on Eighth Circuit precedent there is little likelihood that Mr. Muhammad will succeed on the merits. The Court, therefore, finds that Mr. Muhammed's [sic] Motion for Preliminary Injunction and Temporary Restraining Order (Doc. No. 3) should be DENIED.

IV. SCREENING

The Prison Litigation Reform Act requires federal courts to screen prisoner complaints seeking relief against a governmental entity, officer, or employee. 28 U.S.C. § 1915A(a). According to 28 U.S.C. § 1915(e)(2)(B) the court may dismiss a prisoner case at any time if the court determines that the prisoner's complaint is either frivolous or malicious, fails to

state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B).

Here, the Court has convened a hearing and has considered Mr. Muhammad's testimony during the hearing to be true, drawn appropriate inferences in his favor, and refrained from making any credibility determinations. In considering "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986), the Court finds dismissal is appropriate in this case as a matter of law.

A. Standard

The court must dismiss a complaint or portion thereof if the prisoner has raised claims that: (a) are legally frivol as or malicious; (b) fail to state a claim upon wh h relief may be granted; or (c) seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B). An action is frivolous if "it lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). An action fails to state a claim upon which relief can be granted if it does not plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007). In reviewing a *pro se* complaint under § 1915(e)(2)(B), the court must give the complaint the benefit of a

liberal construction. *Haines v. Kerner,* 404 U.S. 519, 520 (1972). The court must also weight all factual allegations in favor of the plaintiff, unless the facts alleged are clearly baseless. *Denton v. Hernandez,* 504 U.S. 25, 32 (1992); *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974). But regardless of whether a plaintiff is represented or appearing *pro se,* his "complaint must contain specific facts supporting its conclusions." *See Martin v. Sargent,* 780 F.2d 1334, 1337 (8th Cir. 1985).

A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Twombly* at 556. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *See id.* Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility" of entitlement to relief. *Id.* at 557.

B. The Free Exercise Clause and RLUIPA

"It is well settled that a prison inmate retains those constitutional rights that are not inconsistent with his status as a prisoner or the legitimate penological objectives of the corrections system." *Turner v. Safley,* 482 U.S. 78, 95 (1987) (quoting *Pell v. Procunier,* 417 U.S. 817, 822 (1974)) (internal quotations omitted). The evaluation of penological

objectives in this context is "committed to the considered judgment of prison administrators." *O'Lone v Shabazz,* 482 U.S. 342, 349 (1987); *Fegans,* 537 F.3d at 902. To ensure that courts afford appropriate deference to those judgments, courts review prison regulations alleged to infringe on constitutional rights under a "reasonableness test" that is less restrictive than ordinarily applied to alleged infringements of fundamental rights. *O'Lone,* 482 U.S. at 349; *Fegans,* 537 F.3d at 902.

A prison regulation or action is valid, even if it restricts a prisoner's constitutional rights, if it is "reasonably related to legitimate penological interest." *Gladson,* 551 F.3d at 832 (quoting *Turner,* 482 U.S. at 89). When determining whether a prison regulation or action is reasonably related to legitimate penological interests, the court considers the following factors: (1) whether there is a valid rational connection between the prison regulation and the government interest in justifying it; (2) whether there is an alternative means of exercising the right that remains open to prison inmates; (3) whether the accommodation will have a significant "ripple effect" on guards and other inmates and on the allocation of prison resources; and (4) whether there is an alternative that fully accommodates the prisoner at de minimis cost to valid penological interest. *Turner,* 482 U.S. at 90; *Gladson,* 551 F.3d at 831.

In 2000, Congress enacted RLUIPA to provide additional protection for institutionalized persons' religious freedom. *Singson v. Norris,* 553 F.3d 660,

662 (8th Cir. 2009); *Murphy v. Mo. Dep't of Corrs.*, 372 F.3d 979, 987 (8th Cir. 2004). RLUIPA provides that:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, unless the government demonstrates that imposition of the burden on that person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1. RLUIPA "defines 'religious exercise' to include 'any exercise of religion, whether or not compelled by, or central to, a system of religious beliefs.'" *Van Wyhe v. Reisch,* 581 F.3d 639, 655-56 (8th Cir. 2009) (quoting *Cutter v. Wilkinson,* 544 U.S. 709, 722 (2005)). RLUIPA bars inquiry into whether a particular belief or practice is central to a prisoner's religion. *Gladson,* 551 F.3d at 832.

A prisoner's claim under RLUIPA is, instead, evaluated under a compelling interest standard. *Cutter,* 544 U.S. at 722; *Gladson,* 551 F.3d at 832; *Patel v. U. S. Bureau of Prisons,* 515 F.3d 807, 813 (8th Cir. 2008). The United States Supreme Court has remarked that "context matters" in the application of this "compelling government interest" standard, and that RLUIPA does not "elevate accommodation of religious observances over an institution's need to maintain order and safety." *Cutter,* 544 U.S. at 722; *Fegans,* 537 F.3d at 902. While the government must meet a higher burden than the rational relationship

test applied in constitutional cases, the court still affords a significant amount of deference to the expertise of prison officials in evaluating whether they met that burden. *Gladson,* 551 F.3d at 832.

When faced with both a Free Exercise Claim and a RLUIPA claim, a court must as a threshold matter, inquire as to whether the prison has placed a "substantial burden" on the prisoner's ability to practice his religion. *Van Wyhe,* 581 F.3d at 655; *Gladson,* 551 F.3d at 833; *Patel,* 515 F.3d at 813. If the court determines that a regulation imposes a substantial burden on a prisoner, the Court will then review the burden under reasonableness and compelling interest standards. *See Gladson,* 551 F.3d at 833; *Patel,* 515 F.3d at 813. To constitute a substantial burden, the policy or regulation

> must significantly inhibit or constrain conduct or expression that manifest some central tenet of a person's individual religious beliefs; must meaningfully curtail a person's ability to express adherence to his or her faith; or must deny a person reasonable opportunities to engage in those activities that are fundamental to a person's religion.

Van Wyhe, 581 F.3d at 656; *Gladson,* 551 F.3d at 833; *Patel,* 515 F.3d at 813. When the significance of a religious belief is not at issue, the same definition of "substantial burden" applies under the Free Exercise

Clause and RLUIPA.[2] *Gladson,* 551 F.3d at 832; *Patel,* 515 F.3d at 813. If the prisoner fails to put forth sufficient evidence that his ability to practice his religion has been substantially burdened, then the court need not apply the *Turner* test to the Free Exercise Claim and the strict scrutiny test to the RLUIPA claim. *Gladson,* 551 F.3d at 833.

C. Analysis

As discussed earlier in this disposition, the Defendants expressed numerous safety and security concerns during the January 4, 2012, hearing regarding why the ADC grooming policy prohibits inmates from maintaining facial hair. Prison safety and security are compelling government interests. *Singson,* 553 F.3d at 662. Mr. Muhammad acknowledges that the Defendants have a legitimate penological interest in maintaining the grooming policy. However, he argues that the ADC prohibition on facial hair is not the least restrictive means available to address those interests.

Mr. Muhammad points out that ADC grants a medical exemption to inmates with certain dermatological conditions, which allows for a one-quarter-inch

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[2] It has been recognized that portions of the definition of "substantial burden" requiring religious beliefs to be a "central tenet" or "fundamental" may not apply to a RLUIPA claim. *Gladson,* 551 F.3d at 832-33. In the instant case, Defendants do not challenge the sincerity of Mr. Muhammad's beliefs.

beard. Mr. Muhammad seeks a one-half-inch beard. And Mr. Muhammad does not assert "that the medical exemption would satisfy his religious beliefs." *See Fegans,* 537 F.3d 906.

Mr. Muhammad also suggests that Defendants could follow the same procedures used by the New York Department of Correction, where a photo is taken of inmates with and without facial hair. When questioned about the harm in following the procedures used in New York, Warden Lay replied that an inmate might enter the ADC with a beard and maintain said beard until he escapes. He said, conversely, an inmate might also enter the ADC clean shaven only to grow a beard upon escape. "Although prison policies from other jurisdictions provide some evidence as to the feasibility of implementing a less restrictive means of achieving prison safety and security, it does not outweigh the deference owed to the expert judgment of prison officials who are infinitely more familiar with their own institutions than outside observers." *Fegans,* 537 F.3d at 905 (quoting *Hamilton v. Schriro,* 74 F.3d 1545, 1556 n. 15 (8th Cir. 1996)).

In considering the pleadings and testimony in this matter, the Court finds that the ADC demonstrated a compelling penological interest in prohibiting Mr. Muhammad from maintaining a one-half-inch beard, and that this prohibition was the least restrictive means available in furthering that interest. The Court further finds that Mr. Muhammad's ability to practice his religion has not been substantially

burdened. During the hearing he testified that he had been provided a prayer rug and a list of distributors of Islamic material, he was allowed to correspond with a religious advisor, and was allowed to maintain the required diet and observe religious holidays.

Upon giving Mr. Muhammad full credit for his testimony, the Court finds that his claims fail as a matter of law. His Complaint (Doc. No. 2) should, therefore, be dismissed, pursuant to 28 U.S.C. § 1915(e)(2)(B) for failure to state a claim on which relief may be granted.

V. CONCLUSION

IT IS, THEREFORE, RECOMMENDED THAT:

1. The Court's Order (Doc. No. 28) granting Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order should be VACATED.

2. Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order (Doc. No. 3) should be DENIED.

3. Plaintiff's Complaint (Doc. No. 2) should be DISMISSED with prejudice for failure to state a claim on which relief may be granted.

4. Dismissal of this action constitutes a "strike" for purposes of 28 U.S.C. § 1915(g).[3]

5. All pending motions should be DENIED as moot.

DATED this 27th day of January, 2012.

/s/ Joe J. Volpe
JOE J. VOLPE
UNITED STATES
MAGISTRATE JUDGE

[3] The PLRA provides: "In no event shall a prisoner bring a civil action or appeal a judgment in a civil action under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted."

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

GREGORY HOLT
(Abdul Maalik Muhammad)
ADC #129616 **PLAINTIFF**

v. **CASE NO. 5:11CV00164 BSM**

RAY HOBBS, Director,
Arkansas Department of
Correction, et al. **DEFENDANTS**

ORDER

(Filed Mar. 23, 2012)

The proposed findings and recommended disposition submitted by United States Magistrate Judge Joe J. Volpe [Doc. No. 82] and the filed objections [Doc. No. 86] have been reviewed. After carefully considering this document and making a *de novo* review of the record, it is concluded that the proposed findings and recommended disposition should be, and hereby are, approved and adopted in their entirety in all respects.

Holt's motion for an emergency hearing [Doc. No. 89] is denied. In his motion, Holt states that he has been placed in administrative segregation in retaliation for filing the present suit challenging the Arkansas Department of Correction's (ADC) grooming policy. Doc. No. 89 at ¶ 1. Holt admits that he was initially placed in administrative segregation upon

his own request. [Doc. No. 87] at ¶ 2. Holt also admits that upon his request to be released from administrative segregation, his request was denied based on actions he had taken in violation of ADC policy, including sending a threatening letter to a local police department. *Id.* at ¶ 3. *See* Doc. 84-1. "It is well established that prisoners have narrowly defined liberty interests, for imprisonment necessarily retracts many of the liberties of the free. Among the liberties which prisoners do not enjoy is choice of cells. Transfer within the prison, or to another prison, is within the discretion of prison officials." *Lyon v. Farrier,* 727 F.2d 766, 768 (8th Cir. 1984). Therefore, Holt's motion for an emergency hearing [Doc. No. 89] is denied.

IT IS THEREFORE ORDERED that:

1. Holt's complaint [Doc. No. 2] be dismissed with prejudice for failure to state a claim on which relief can be granted.

2. Dismissal of this action constitutes a "strike" for purposes of 28 U.S.C. § 1915(g).

3. Holt's motion for an emergency hearing [Doc. No. 89] is denied.

4. All remaining pending motions are denied as moot.

An appropriate judgment shall accompany this order.

IT IS SO ORDERED this 23rd day of March 2012.

/s/ Brian S. Miller
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

GREGORY HOLT
(Abdul Maalik Muhammad)
ADC #129616 **PLAINTIFF**

v. **CASE NO. 5:11CV00164 BSM**

RAY HOBBS, Director,
Arkansas Department of
Correction, et al. **DEFENDANTS**

JUDGMENT

Consistent with the order entered today, this case is hereby dismissed with prejudice and the relief sought is denied.

Dated this 23rd day of March 2012.

/s/ Brian S. Miller
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

GREGORY HOLT
(Abdul Maalik Muhammad)
ADC #129616 **PLAINTIFF**

v. **CASE NO. 5:11CV00164 BSM**

RAY HOBBS, Director,
Arkansas Department of
Correction et al. **DEFENDANTS**

ORDER

Defendant Gregory Holt's motion to stay execution [Doc. No. 96] of the March 23, 2012, order and his motion for an extension of time to file a notice of appeal [Doc. No. 98] are granted.

The free exercise of one's religious faith is fundamental and the First Amendment's guaranty of this freedom warrants the granting of the stay and extension. Accordingly, the March 23, 2012, order [Doc. No. 93] is stayed pending appeal and Holt has up to and including 14 days from the date of this order to file a notice of appeal.

IT IS SO ORDERED this 19th day of April 2012.

/s/ Brian S. Miller
UNITED STATES
DISTRICT JUDGE

United States Court of Appeals
for the Eighth Circuit

No. 12-3185

Gregory Houston Holt, also known as
Abdul Maalik Muhammad

Plaintiff-Appellant

v.

Ray Hobbs, Director, Arkansas Department of Correction; Gaylon Lay, Warden, Cummins Unit, ADC; D W Tate, Captain, Cummins Unit, Arkansas Department of Correction; V. R. Robertson, Major, Cummins Unit, Arkansas Department of Correction; M. Richardson, Sgt., Cummins Unit, Arkansas Department of Correction; Larry May, Chief Deputy Director, Arkansas Department of Correction

Defendants-Appellees

Appeal from United States District Court for the
Eastern District of Arkansas – Pine Bluff

Submitted: June 6, 2013
Filed: June 12, 2013
[Unpublished]

Before BYE, ARNOLD, and SHEPHERD, Circuit Judges.

PER CURIAM.

In this action challenging the Arkansas Department of Correction (ADC) grooming policy under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1(a)(1)-(2), inmate Gregory Holt (also known as Abdul Maalik Muhammad) appeals the district court's[1] order dismissing his action after an evidentiary hearing.

In his complaint and motion for a preliminary injunction and temporary restraining order, Mr. Holt asserted that one of his fundamentalist Muslim beliefs was that he must grow a beard, but defendants substantially burdened his ability to practice his religion by enforcing ADC's grooming policy, which allowed trimmed mustaches but otherwise no facial hair, with quarter-inch beards permitted only for a diagnosed dermatological problem. Mr. Holt sought permission to maintain a half-inch beard as a compromise position, to balance his religious beliefs with ADC's security needs. The district court initially granted temporary injunctive relief. The court vacated its order and dismissed the complaint, however, after the hearing produced evidence that Mr. Holt had a prayer rug and a list of distributors of Islamic material, he was allowed to correspond with a

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[1] The Honorable Brian S. Miller, Chief Judge, United States District Court for the Eastern District of Arkansas, adopting the report and recommendations of the Honorable Joe J. Volpe, United States Magistrate Judge for the Eastern District of Arkansas.

religious advisor, and he was allowed to maintain the required diet and observe religious holidays; that the grooming policy helped prevent inmates from concealing contraband, drugs, or weapons; that an inmate who grew a beard could change his appearance quickly by shaving; that affording special privileges to an individual inmate could result in his being targeted by other inmates; and that prison officials believed the grooming policy was necessary to further ADC's interest in prison security.

Following careful review, *see Johnson v. Bi-State Justice Ctr.*, 12 F.3d 133, 135 (8th Cir. 1993) (where judgment is granted after evidentiary hearing, standard is whether evidence presents sufficient disagreement to require submission to jury or is so one-sided that one party must prevail), we conclude that defendants met their burden under RLUIPA of establishing that ADC's grooming policy was the least restrictive means of furthering a compelling penological interest, *see Fegans v. Norris*, 537 F.3d 897, 903 (8th Cir. 2008) (absent substantial evidence in record indicating that response of prison officials to security concerns is exaggerated, courts should ordinarily defer to their expert judgment in such matters), notwithstanding Mr. Holt's citation to cases indicating that prisons in other jurisdictions have been able to meet their security needs while allowing inmates to maintain facial hair, *see id.* at 905 (although prison policies from other jurisdictions provide some evidence as to feasibility of implementing less restrictive means of achieving prison safety and

security, it does not outweigh deference owed to expert judgment of prison officials who are more familiar with their own institutions).

Accordingly, we affirm, but we modify the judgment to reflect that the dismissal does not count as a "strike" for purposes of 28 U.S.C. § 1915(g).

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 12-3185

Gregory Houston Holt, also known as
Abdul Maalik Muhammad

Plaintiff-Appellant

v.

Ray Hobbs, Director, Arkansas Department of Correction; Gaylon Lay, Warden, Cummins Unit, ADC; D W Tate, Captain, Cummins Unit, Arkansas Department of Correction; V. R. Robertson, Major, Cummins Unit, Arkansas Department of Correction; M . Richardson, Sgt., Cummins Unit, Arkansas Department of Correction; Larry May, Chief Deputy Director, Arkansas Department of Correction

Defendants-Appellees

Appeal from U .S. District Court for the Eastern District of Arkansas – Pine Bluff (5:11-cv-00164-BSM)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in

this cause is affirmed in accordance with the opinion of this Court.

June 12, 2013

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 12-3185

Gregory Houston Holt,
also known as Abdul Maalik Muhammad

Appellant

v.

Ray Hobbs, Director,
Arkansas Department of Correction, et al.

Appellees

Appeal from U.S. District Court for the
Eastern District of Arkansas – Pine Bluff
(5:11-cv-00164-BSM)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 17, 2013

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 12-3185

Gregory Houston Holt,
also known as Abdul Maalik Muhammad

Appellant

v.

Ray Hobbs, Director,
Arkansas Department of Correction, et al.

Appellees

Appeal from U.S. District Court for the
Eastern District of Arkansas – Pine Bluff
(5:11-cv-00164-BSM)

ORDER

The motion to recall the mandate and to stay the mandate, filed by Appellant Mr. Gregory Houston Holt, has been considered by the court and is denied.

August 01, 2013

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

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134 S.Ct. 635

Supreme Court of the United States

Gregory Houston HOLT,
aka Abdul Maalik Muhammad, petitioner,
v.
Ray HOBBS, Director,
Arkansas Department of Correction, et al.

No. 13-6827 (13A374).
Nov. 14, 2013.

Application for an injunction submitted to Justice ALITO and by him referred to the Court granted pending disposition of applicant's petition for writ of certiorari. Respondents are enjoined from enforcing the Arkansas Department of Correction's grooming policy to the extent that it prohibits applicant from growing a one-half-inch beard in accordance with his religious beliefs. If the Court denies the petition for writ of certiorari, this order shall terminate automatically. If the Court grants the petition for writ of certiorari, this order shall terminate when the Court enters its judgment.

MONDAY, MARCH 3, 2014

CERTIORARI GRANTED

13-6827 HOLT, GREGORY H. V. HOBBS, DIR., AR DOC, ET AL.

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

MONDAY, MARCH 3, 2014

ORDER IN PENDING CASE

13-6827 HOLT, GREGORY H. V. HOBBS, DIR., AR DOC, ET AL.

The order granting the petition for a writ of certiorari is amended as follows: The motion of petitioner for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted limited to the following question: "Whether the Arkansas Department of Correction's grooming policy violates the Religious Land Use and Institutionalized Persons Act of 2000, 42 U. S. C. §2000cc *et seq.*, to the extent that it prohibits petitioner from growing a one-half-inch beard in accordance with his religious beliefs."

PETITIONER'S BRIEF

No. 13-6827

In the Supreme Court of the United States

GREGORY HOUSTON HOLT
A/K/A ABDUL MAALIK MUHAMMAD,
PETITIONER

v.

RAY HOBBS, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION, ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the Arkansas Department of Correction's grooming policy violates the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc *et seq.* (2006), to the extent that it prohibits petitioner from growing a one-half-inch beard in accordance with his religious beliefs.

PARTIES TO THE PROCEEDINGS

Petitioner is Gregory Houston Holt, a/k/a Abdul Maalik Muhammad. Respondents are six employees of the Arkansas Department of Correction:

Director Ray Hobbs
Chief Deputy Director Larry May
Warden Gaylon Lay
Major Vernon Robertson
Captain Donald Tate
Sergeant Michael Richardson

All respondents are sued in their official capacities only.

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OPINIONS BELOW

The magistrate's recommendations are reported at 2012 WL 994481 (E.D. Ark. Jan. 27, 2012), J.A. 160.

The District Court's order adopting those recommendations is reported at 2012 WL 993403 (E.D. Ark. Mar. 23, 2012), J.A. 179.

The Eighth Circuit's opinion is reported at 509 F App'x 561 (8th Cir. 2013), J.A. 184, *rehearing and rehearing en banc denied*, J.A. 190.

The District Court's preliminary injunction, J.A. 34, the order continuing that injunction pending appeal, J.A. 183, and the Eighth Circuit's order refusing to stay its mandate, J.A. 191, are all unreported. This Court's injunction pending disposition of the petition for certiorari is reported at 134 S. Ct. 635 (2013), J.A 192.

JURISDICTION

The Eighth Circuit entered judgment on June 12, 2013. J.A. 188. It denied a timely petition for rehearing on July 17, 2013. J.A. 190. The petition for certiorari was filed on September 27, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Religious Land Use and Institutionalized Persons Act (RLUIPA) provides:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition

of the burden on that person —

> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1(a) (2006).

> The term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

42 U.S.C. § 2000cc-5(2). These provisions are also reprinted in an appendix to this brief, along with all related provisions relevant to RLUIPA's application to prisons. App., *infra*, 1a-9a.

The definition of "institution" in § 1997 includes state prisons. The Act applies to those prisons that receive federal financial assistance. 42 U.S.C. § 2000cc-1(b). It is undisputed that the Arkansas prisons receive federal financial assistance.[1]

Petitioner challenges Administrative Directive 98-04.D of the Arkansas Department of Correction, which provides:

> No inmates will be permitted to wear facial hair other than a neatly trimmed mustache that does not extend beyond the corner of the mouth or over the lip. Medical staff may prescribe that

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[1] See Arkansas Department of Correction, *Annual Report 2012*, at 3, http://adc.arkansas.gov/resources/Documents/2012_Annual_Report_final.pdf (describing $ 574,461 in federal grants for FY2012); see also *Cutter* v. *Wilkinson*, 544 U.S. 709, 716 n.4 (2005) (noting that every state prison system receives such assistance).

> inmates with a diagnosed dermatological problem may wear facial hair no longer than one quarter of an inch. Inmates must present MSF 207 upon demand.

J.A. 164. MSF 207 is a form for prisoners covered by the medical exception. J.A. 109, 118. The full text of Administrative Directive 98-04 and related regulations is reprinted in the appendix to this brief. App., *infra*, 10a-16a.[2]

INTRODUCTION

In 1879, Justice Field confronted a San Francisco ordinance requiring that the hair of inmates in the county jail be cut to a "uniform length of one inch from the scalp." *Ho Ah Kow* v. *Nunan*, 12 F. Cas. 252, 253 (Field, Circuit Justice, C.C.D. Cal. 1879). The ordinance burdened the "religious faith of the Chinese" because it required the queue — a long braid of hair — to be cut off. *Ibid.* Justice Field, writing for the court, held that the ordinance violated the Equal Protection Clause, because it "act[ed] with special severity upon Chinese prisoners, inflicting upon them suffering altogether disproportionate to what would be endured by other prisoners." *Id.* at 255. Indeed, it was as if the city had mandated that "all prisoners confined in the county jail should be fed on pork," even if they were

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[2] Respondents introduced all of Directive 98-04 and related policies, and a photocopy of a cell-phone SIM card next to a ruler, as exhibits at an evidentiary hearing before the magistrate. J.A. 119-120, 128-129. These exhibits were returned to counsel for respondents after the hearing, Letter from Clerk returning exhibits, ECF No. 79, and apparently were not restored to the record on appeal. Counsel for respondent has supplied copies of both exhibits to counsel for petitioner, and these copies have been placed in the custody of the Clerk pursuant to Rule 32.1.

Jewish. *Id.* at 255. It made no difference that the ordinance was written in "general terms" or that the prison officials had raised unjustified concerns of health and discipline. *Ibid.* Requiring an inmate to contradict his deeply held religious beliefs was "unworthy" of the United States. *Id.* at 256.

This case comes 135 years later, but the claims and defenses are substantially the same. The difference is that this case is easier: Petitioner seeks relief under a federal civil rights statute specifically designed to protect the religious exercise of prisoners, 42 U.S.C. § 2000cc *et seq.* (2006) (RLUIPA), and under a precedent that requires robust and individualized application of strict scrutiny, *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

The state-imposed burden on petitioner's religious practice of keeping a beard is incontrovertible. Respondents say they can allow no exceptions to the no-beard rule because of security concerns. But that defense is not tenable when forty-four other state and federal prison systems with the same security interests allow the beards that Arkansas forbids. The defense is also untenable because the evidence offered to support it is too weak to satisfy RLUIPA's compelling interest test or to merit any deference. Like the health and discipline interests raised by the defendants in *Ho Ah Kow*, these are post-hoc rationalizations for bureaucratic stubbornness, or worse.

In *Ho Ah Kow*, Justice Field believed that the ordinance was motivated by open hostility to the Chinese. Respondents' refusal to extend a religious exception to petitioner is almost as troubling because it indicates hostile indifference to the faiths of religious minorities.

Just as San Francisco should not have knowingly inflicted on Ho Ah Kow "suffering altogether disproportionate to what would be endured by other prisoners" by cutting off his queue, *Ho Ah Kow*, 12 F. Cas. at 255, Arkansas should not knowingly inflict similarly disproportionate suffering on petitioner by prohibiting his religiously mandated beard.

STATEMENT

1. Petitioner Gregory Holt, also known as Abdul Maalik Muhammad, is an inmate of the Arkansas Department of Correction. Petitioner is a devout Muslim who seeks to grow a half-inch beard in accordance with the obligations of his faith. J.A. 18, 54.

Respondents have never questioned the sincerity of petitioner's belief that he must grow his beard. That belief is based on *hadith*, which are accounts of the acts or statements of the Prophet Muhammad. J.A. 54, 58-59. *Hadith* are generally viewed as the most important source of Islamic law after the Koran.[3]

Petitioner believes that faithful Muslims should obey the sayings of the Prophet collected in *hadith*. J.A. 58-59 (citing the Koran, Surah 4:80). With respect to his beard, petitioner cited the *hadith* stating: "Allah's Messenger said, 'Cut the moustaches short and leave the beard (as it is).'" *The Translation of the Meanings of Sahih Al-Bukhari* ¶ 5893 (Muhammad Muhsin Khan trans., Darussalam Pubs. 1997); J.A. 18, 54. Other *hadith* elaborate this teaching. "The Prophet

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[3] This brief account of *hadith*, except where cited to some other source, is based on J. Robson, *Hadith*, in 3 *The Encyclopedia of Islam* 23, 23-25 (Bernard Lewis, *et al.* eds., new ed. 1986); Cyril Glassé, *The New Encyclopedia of Islam* 177-79 (3d ed. 2008); and *The Oxford Dictionary of Islam* 101-02 (John L. Esposito ed., 2003).

said, 'Do the opposite of what *Al-Mushrikun* do. Grow abundantly the beards and cut the moustaches short.'" *Sahih al Bukhari* ¶ 5892. Similarly, "Abu Huraira reported: The Messenger of Allah (may peace be upon him) said: Trim closely the moustache, and grow beard, and thus act against the fire-worshippers." *Sahih Muslim* ¶ 501 (Abdul Hamid Siddiqi trans., Sh. Muhammad Ashraf 1971).

The *Al-Mushrikun* were pagans and polytheists. *Sahih Al-Bukhari* ¶ 5892 n.1. "Fire-worshippers" was a pejorative term for Zoroastrians. S.A. Nigosian, *The Zoroastrian Faith: Tradition and Modern Research* 113 (1993). The obligation to grow the beard visibly distinguished faithful Muslims from adherents of these other faiths. *Sahih Muslim* ¶ 500 n.471.

Petitioner testified that the teaching to grow the beard is a "sound Hadith." J.A. 54, 63. The soundness of *hadith*, a subject of much study in Islam, refers to the reliability with which a teaching is attributed to the Prophet. Petitioner cited the *Sahih Al-Bukhari*, which is widely accepted as the soundest, or most authoritative, collection of *hadith*. Multiple reports of the same teaching are further evidence of soundness.

2. Respondent Ray Hobbs is Director of the Arkansas Department of Correction. J.A. 17. Respondent Larry May is the Chief Deputy Director. J.A. 33. Other respondents are officers at the Cummins Unit, where petitioner was housed during the proceedings below. J.A. 29, 53-54. All respondents are sued only in their official capacities. J.A. 17, 32-33.

The Department's Directive 98-04 prohibits beards, but exempts quarter-inch beards grown for medical reasons. J.A. 164; pp. 2-3, *supra*. If an inmate grows a beard in violation of the grooming policy, he is subject

to progressively escalating disciplinary action. J.A. 18, 29, 55, 164.

All Arkansas inmates are photographed upon admission to prison. Ark. Admin. Code 004.00.1-I, (C)(6). If a change in hair, mustache, sideburns, or beard significantly changes an inmate's appearance, a new photograph is taken. *Ibid.*

3. Petitioner sought permission to grow a beard through the prison grievance process and exhausted that potential remedy. Plaintiff's Exhibits, ECF No. 13. Throughout the grievance process and ensuing litigation, petitioner took a conservative approach to relief. Although he understands *hadith* to require him to leave his beard entirely uncut, J.A. 65, he sought permission to grow only a half-inch beard, J.A. 18-19, 57, 65-66, 142-43. A half-inch beard is an extremely short beard — about 70% of the diameter of a dime.

Petitioner based the half-inch limitation on a reported case ordering California officials to allow Muslim prisoners to grow a half-inch beard. *Mayweathers* v. *Terhune*, 328 F Supp. 2d 1086 (E.D. Cal. 2004); J.A. 19, 55-56. California has since repealed its beard restrictions entirely. Dawinder S. Sidhu, *Religious Freedom and Inmate Grooming Standards*, 66 U. Miami L. Rev. 923, 964 (2012).

Petitioner viewed a half-inch beard as a "compromise." J.A. 143, 164. Respondents rejected petitioner's offer. J.A. 164. The warden stated: "[Y]ou will abide by ADC policies and if you choose to disobey, you can suffer the consequences." Plaintiff's Exhibits at 6, ECF No. 13.

4. Having exhausted his administrative remedies, petitioner filed a complaint, J.A. 16, and a motion for a preliminary injunction and temporary restraining

order, ECF No. 3. The magistrate recommended that the motion be denied. J.A. 30-31. But the District Court granted a preliminary injunction without a hearing, J.A. 34, and remanded to the magistrate for "a temporary injunction hearing." J.A. 35.

At the hearing, petitioner testified that it is impossible to hide anything in his beard, J.A. 56-57, 70, 75, and that there are many other places in which a prisoner might hide contraband more effectively, J.A. 56, 64-65, 69, 139-42.

Respondents offered two witnesses. The first was respondent Gaylon Lay, one of the wardens at the Cummins Unit. J.A. 79. The second was Grant Harris, an Assistant Director of the Department of Correction. J.A. 112-13.

They testified to their personal belief that inmates could hide contraband even in a half-inch beard. J.A. 80, 84-85, 116-17, 123, 126. Neither witness offered any specific example, from Arkansas or elsewhere. Both witnesses acknowledged that inmates could hide contraband in many other places, J.A. 98, 103-04, 106, 115-17, 121, 126-27, 132, and Mr. Harris testified that staff smuggle contraband for inmates, J.A. 122, 132. Mr. Lay acknowledged that the amount of contraband had actually increased since a court had upheld the no-beard policy in 2006. J.A. 86.

Mr. Lay testified that a prisoner who escaped could change his appearance by shaving his beard. J.A. 80, 96. Here again, he offered no examples of this ever happening. When asked on cross-examination why the Department could not photograph petitioner both with and without a beard — as other prison systems do, J.A. 69, 176 — both witnesses elaborated their earlier testimony and avoided answering the question. J.A. 104,

123. In fact, as already noted, Arkansas requires that a new photograph be taken any time an inmate changes his appearance. Ark. Admin. Code 004.00.1-I(C)(6).

Mr. Lay also worried that the Department would be unable to measure a half-inch beard on a consistent basis. J.A. 80-83, 107. However, he acknowledged that the prison has monitored the length of the quarter-inch beards permitted for medical reasons, without suggesting that there had been any problems. J.A. 109.

Finally, both witnesses testified that they simply could not make an exception for any inmate on any issue, because any exception would either cause resentment, endangering the inmate who got the exception, J.A. 86-87, 118, or make that inmate a leader within the inmate population, J.A. 118-19. Once again, neither witness offered any examples. At the time of the hearing, petitioner had been wearing a beard for about three months due to the preliminary injunction. J.A. 34, 65. Mr. Harris testified that he knew of no hostility directed at petitioner because of his beard nor of any inmates making him a leader because of his beard. J.A. 121.

5. As further detailed at pp. 24-26, *infra*, at least forty-four American state and federal prison systems have regulations that would permit an inmate with petitioner's religious beliefs to maintain a half-inch beard. See Sidhu, 66 U. Miami L. Rev. at 964-72 (collecting prison grooming standards from fifty states plus the United States and District of Columbia). Forty-two of those jurisdictions would impose no length limitation. *Ibid.* Petitioner, respondents' counsel, and the magistrate all asked respondents' witnesses about the policies in New York, California, and

other states where beards are permitted. Neither witness knew anything about these policies or the experiences of other states. J.A. 101-02, 105-06, 110-11, 119, 127.

6. Because of the District Court's preliminary injunction, J.A. 34, petitioner had a beard at the hearing, J.A. 58, and the magistrate was able to observe it. At the conclusion of the hearing, the magistrate said to petitioner: "I look at your particular circumstance and I say, you know, it's almost preposterous to think that you could hide contraband in your beard." J.A. 155.

Nevertheless, the magistrate said he was required to defer to respondents' testimony. J.A. 155-56. He relied on *Fegans* v. *Norris*, 537 F.3d 897 (8th Cir. 2008), which had rejected an earlier RLUIPA challenge to respondents' grooming policy. Petitioner emphasized that while *Fegans* rejected a claim to both hair and beard of unlimited length, he sought only a half-inch beard. J.A. 69, 139, 151. The magistrate acknowledged this factual distinction, but read *Fegans* to command "deference to the prison officials if they're able to state legitimate penological needs." J.A. 154.

In his written recommendations, the magistrate characterized as "compelling" petitioner's argument that "an inmate could easily hide contraband in many places other than a one-half-inch-beard." J.A. 168. But he again emphasized that "the prison officials are entitled to deference," *ibid.*, and concluded that under *Fegans*, petitioner had little chance of success on the merits, J.A. 169. He recommended that the preliminary injunction be vacated.

He also screened the complaint under 28 U.S.C. §§ 1915A(b) and 1915(e)(2)(B), which permit dismissal of any prisoner claim that is frivolous or malicious,

fails to state a claim on which relief can be granted, or seeks monetary relief from an immune defendant. J.A. 169-70. In the Eighth Circuit, these statutory grounds have been expanded to include cases in which the evidence is so one-sided that no further proceedings are necessary. J.A. 170; *Johnson* v. *Bi-State Justice Center/Ark. Dep't of Corr.*, 12 F.3d 133, 136 (8th Cir. 1993).

On the basis of this screening, the magistrate concluded that respondents had demonstrated compelling interest and least restrictive means. J.A. 176. He also concluded that petitioner's religious exercise had not been substantially burdened, because he was allowed to practice other elements of Islam unrelated to beards. J.A. 176-77. He then recommended, without further explanation, that petitioner's complaint be dismissed for failure to state a claim on which relief could be granted. J.A. 177.

The District Court adopted the magistrate's written recommendations "in their entirety in all respects," J.A. 179, and "dismissed with prejudice for failure to state a claim on which relief can be granted," J.A. 180. But the court later stayed that order, thus reinstating the preliminary injunction pending appeal. J.A. 183.

7. The Eighth Circuit affirmed in a brief and unpublished per curiam opinion. J.A. 184. It emphasized deference to respondents' testimony and paraphrased its previous decision in *Fegans*. J.A. 186-87.

The court also modified the judgment to provide that "the dismissal does not count as a 'strike' for purposes of 28 U.S.C. § 1915(g)." J.A. 187. That section bars further complaints by prisoners who have had three cases dismissed as frivolous or malicious or for failure to state a claim. The holding that this case does

not fall within this section implies, appropriately, that the dismissal was not for failure to state a claim; rather, the court believed that respondents had proved their affirmative defense of compelling interest and least restrictive means.

The Eighth Circuit refused to stay its mandate. J.A. 191. This Court then granted an injunction permitting petitioner to keep his half-inch beard pending disposition of his petition for certiorari. J.A. 192.

SUMMARY OF ARGUMENT

This case presents a basic question of statutory interpretation: Does the Religious Land Use and Institutionalized Persons Act mean what it says, or should the legislative history be interpreted to trump the statutory text and require extreme deference to defendant prison officials?

I. RLUIPA's text says that a substantial burden on a prisoner's exercise of religion can be justified only if imposition of that burden on the prisoner is the least restrictive means of furthering a compelling government interest. This is the same strict-scrutiny standard that applies under the Religious Freedom Restoration Act (RFRA), which this Court enforced according to its terms in *O Centro*, 546 U.S. 418. The two statutes are *in pari materia* and substantially identical in their key provisions. RLUIPA also places the burden of proving compelling interest and least restrictive means on the government, but the Eighth Circuit explicitly shifted that burden to petitioner.

II. Respondents bear the burden of proving their affirmative defense under strict scrutiny because they have plainly imposed a substantial burden on petitioner's exercise of religion. They prohibit him from complying with a compulsory obligation of his faith

and back that prohibition with serious and cumulative penalties.

III.A. Respondents have not come close to demonstrating either compelling interest or least restrictive means. At least forty-four other state and federal prison systems would allow petitioner's half-inch beard. Respondents cannot demonstrate a compelling interest without explaining why the rule that works in these prison systems would not also work in Arkansas. Far from doing so, respondents freely admitted that they knew nothing of these other prison systems and had made no attempt to learn.

B. Instead, respondents offered four reasons why they could not accommodate petitioner's half-inch beard. None of these reasons has merit. First, respondents claimed that petitioner could hide contraband in a half-inch beard. But they gave no examples of this ever happening in any prison system, and the magistrate who saw the beard found the idea "almost preposterous." J.A. 155. Respondents also agreed that prisoners can hide contraband in many other places, and they gave no reason why they need to prohibit beards when they do not regulate these other hiding places to the same extent.

Respondents also ignored readily available less restrictive means. They can search beards just like they search any other hiding place. They can order prisoners to run their hands through their own beards to dislodge anything hidden there. And they can require inmates to shave if they are ever caught hiding contraband in their beard. All of these less restrictive alternatives have worked in other prison systems, and respondents failed to address them.

Second, respondents testified that if petitioner escaped, he could shave his beard to change his appearance. Again they gave no examples, and they had no answer to an obvious question: Why not take one photograph clean shaven, and a second photograph with the beard? Respondents already require inmates to take a new photograph whenever they change their appearance, and other prison systems do the same.

Third, respondents testified that it would be difficult to monitor compliance with a half-inch limitation for 15,000 prisoners. But 15,000 prisoners will not want to grow beards for religious reasons, and half an inch is no more difficult to measure than a quarter inch — which respondents already permit for beards grown for medical reasons.

Finally, respondents testified that they can never make any exception for any prisoner on any issue, because other prisoners might resent it. This simply shows their refusal to take RLUIPA seriously; the statute works by requiring religious exemptions.

C. The lower courts accepted this testimony not because it demonstrated a compelling interest and least restrictive means, but because they thought they had to defer to prison officials. To be sure, the legislative history mentions "due deference to the experience and expertise of prison and jail administrators;" but the legislative history cannot shore up defective testimony, much less override the statutory text. If any deference is due, it is due to the cumulative experience of the forty-four prison systems that would allow petitioner's beard — not to the conclusory and implausible testimony in this case.

To the extent that the statutory text permits deference, two bodies of law offer suggestive analogies. Had

the testimony of respondents' witnesses been screened under the standard of *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), much of it would have been inadmissible. The testimony has few indicia of reliability and consists largely of *ipse dixit*. Such testimony certainly is not entitled to deference. And for the same reasons, no deference is due if the testimony is evaluated under the standards of *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944).

D. The courts below accorded respondents' testimony an abject deference that cannot be squared with the statutory text. Instead of applying RLUIPA, they applied the rational-basis standard applicable to certain categories of prisoners' constitutional claims under *Turner* v. *Safley*, 482 U.S. 78 (1987), and wrongly shifted the burden of proof from respondents to petitioner. But RLUIPA was enacted to provide a statutory alternative to the *Turner* standard, and it explicitly places the burden of proving compelling interest and least restrictive means on respondents.

ARGUMENT

I. RLUIPA Enacts a Statutory Standard of Compelling Interest and Least Restrictive Means.

A. The courts below required near-total deference to prison officials under RLUIPA — so much deference that in order to prevail, an official need simply name a penological interest in some way affected by the prisoner's religious claim. That is not what RLUIPA says.

The Religious Land Use and Institutionalized Persons Act provides: "No government shall impose a substantial burden on the religious exercise of a [prisoner]" unless "the government demonstrates that imposition of the burden on that person — (1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a).

This statutory standard was enacted to supplement the much weaker standard for prisoner claims under the Free Exercise Clause, which requires only that the burden be "reasonably related to legitimate penological interests." *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 349 (1987) (quoting *Turner* v. *Safley*, 482 U.S. 78, 89 (1987)). It is that weaker constitutional standard that the lower court's analysis parallels. But RLUIPA's statutory rule is different.

RLUIPA creates a distinct statutory standard providing "heightened protection" for religious exercise. *Cutter* v. *Wilkinson*, 544 U.S. 709, 714 (2005). RLUIPA allows "prisoners to seek religious accommodations under the same standard as set forth in RFRA [the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*]." *Gonzales* v. *O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 436 (2006). That standard is "the strict scrutiny test." *Id.* at 430.

The core provisions of RLUIPA were copied nearly verbatim from RFRA; these provisions are *in pari materia* and substantively identical. Compare 42 U.S.C. § 2000cc-1(a) (RLUIPA) with 42 U.S.C. § 2000bb-1 (RFRA). But Congress's careful coordination of the two statutes did not stop there. Section 7 of RLUIPA amended RFRA to eliminate all references to state law (thus conforming RFRA to the Court's decision in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997)), and to incorporate into RFRA the definition of "religious exercise" enacted in RLUIPA. See 114 Stat. 803, 806 (2000) (RLUIPA); 42 U.S.C. § 2000bb-2(4) (RFRA). When one

statute amends an earlier, related statute, this is further reason to construe the two statutes together. See, *e.g.*, *Abbott* v. *United States*, 131 S. Ct. 18, 28-29 (2010).

Both statutes provide that government may substantially burden the exercise of religion only if it "demonstrates" that it has used the least restrictive means to further a compelling interest. 42 U.S.C. § 2000cc-1(a) (RLUIPA); 42 U.S.C. § 2000bb-1(b) (RFRA). Both statutes define "demonstrates" as "meets the burdens of going forward with the evidence and of persuasion." 42 U.S.C. § 2000cc-5(2) (RLUIPA); 42 U.S.C. § 2000bb-2(3) (RFRA); *O Centro*, 546 U.S. at 428 (interpreting this provision of RFRA).

Both statutes require the government to make this demonstration with respect to the particular person whose religious exercise is burdened. It is "imposition of the burden on that person," 42 U.S.C. § 2000cc-1(a) (RLUIPA), or "application of the burden to the person," 42 U.S.C. § 2000bb-1(b) (RFRA), that must serve a compelling interest by the least restrictive means. "[T]hat person," or "the person," refers to "the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro*, 546 U.S. at 430-31.

It is therefore insufficient to permit prison officials to defeat a RLUIPA claim merely by asserting a general interest in prison security. Of course prison officials have an interest in security, but that is not the question. "[I]nvocation of such general interests, standing alone, is not enough." *Id.* at 438. The question is whether respondents' refusal to allow a religious exception for a half-inch beard is the least restrictive means of furthering a compelling interest. The Court

must look "beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *Id.* at 431.

RLUIPA is also broader than RFRA in one respect. RLUIPA provides that "[t]his chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g).

B. The legislative history of RLUIPA indicates that the statutory standard of compelling interest and least restrictive means is to be administered "with due deference to the experience and expertise of prison and jail administrators." Joint Statement of Senators Hatch and Kennedy, 146 Cong. Rec. 16698, 16699 (2000) (quoting S. Rep. 103-111 at 10 (1993)).[4] The Court took note of this legislative history in *Cutter*, 544 U.S. at 723, and we address it fully below. See Part III.C, *infra*. But at the outset, it is important to note that legislative history cannot override statutory text. When a prison system's witnesses are uninformed and lacking in expertise, little or no deference is due. And as we shall explain, neither the statutory text nor the legislative history permits the abject deference accorded by the courts below.

II. Respondents Have Substantially Burdened Petitioner's Exercise of Religion.

Respondents have not seriously disputed that they substantially burden petitioner's religious exercise.

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[4] This report was the Senate Judiciary Committee's report on RFRA. It is reprinted in 1993 U.S.C.C.A.N. 1892.

RLUIPA defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). Here, petitioner's obligation to grow his beard *is* compelled by his understanding of the Prophet Muhammad's teachings. See pp. 5-6, *supra*. And respondents have never contested petitioner's sincerity.

Respondents have explicitly burdened this religious exercise: If petitioner violates the rule against beards, he must "suffer the consequences." ECF No. 13 at 6. These consequences include progressively escalating disciplinary action, J.A. 18, 29, 55, 145, 164, including loss of privileges, punitive segregation, punitive work assignments, and loss of good-time credits. Ark. Admin. Code 004.00.1-III(C). An outright prohibition of a mandatory religious practice, backed by physical punishment, is a substantial burden under any plausible standard. See, *e.g.*, *Yellowbear* v. *Lampert*, 741 F.3d 48, 56 (10th Cir. 2014) ("flatly prohibiting Mr. Yellowbear from participating in an activity motivated by a sincerely held religious belief" imposes substantial burden); *cf. Wisconsin* v. *Yoder*, 406 U.S. 205, 218 (1972) (Amish were burdened where the "law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs").

Respondents did not argue in the Eighth Circuit, and that court did not hold, that petitioner's religious exercise is not substantially burdened. But a two-sentence passage in the magistrate's recommendations found no substantial burden on petitioner's religious exercise — because he was allowed to practice *other* elements of his religion. J.A. 176-77. That is, because petitioner could obtain a pork-free diet and order religious materials, respondents could force him to violate

his religious obligation to grow a beard. Presumably this would work in reverse; if they let him grow his beard, maybe they could feed him pork every day.

The magistrate cited no authority for this remarkable understanding of substantial burden. It appears to be derived from a passage in *O'Lone*, 482 U.S. at 351-52, which said that prisoners' ability "to participate in other religious observances of their faith supports the conclusion that the restrictions at issue here were reasonable." *Id.* at 352. But *O'Lone* did not apply RLUIPA's statutory strict-scrutiny standard; it applied *Turner*'s rational-basis standard, which ultimately asked only whether the prison regulations were "reasonable." 482 U.S. at 351-52. And even then, it did not hold that the right to practice some elements of a religion meant that prohibiting other elements of the religion was not a burden. Rather, permission to exercise some elements of the religion was simply "a factor in the reasonableness analysis." *Id.* at 349 n.2. This was not a burden holding, and it was not a RLUIPA holding or a strict-scrutiny holding. It was an all-things-considered reasonableness holding.

Nor is *O'Lone* a relevant authority under RLUIPA. Quite the contrary: *O'Lone* is one of the principal reasons Congress applied RFRA's heightened standard to prisoners in the first place. S. Rep. 103-111 at 9-11. Respondents prohibit petitioner from complying with what he understands to be a compulsory religious obligation, and they threaten severe and accumulating penalties if he disobeys their prohibition. This prohibition substantially burdens petitioner's exercise of religion.

III. Respondents Have Not Proved Either Compelling Interest or Least Restrictive Means.

Because respondents have imposed a substantial burden on petitioner's religious exercise, the burden shifts to them to demonstrate that imposing that burden is the least restrictive means of furthering a compelling governmental interest. Respondents have not carried that burden. They have not proved a compelling interest in refusing a religious exception for half-inch beards. They certainly have not proved that refusing such an exception is the least restrictive means of furthering any compelling interest. And they have no plausible reason for prohibiting what at least forty-four American prison systems permit.

A. Respondents Have No Compelling Interest in Prohibiting What At Least Forty-Four American Prison Systems Permit.

1. The experience of other prisons is directly relevant to respondents' claim of compelling interest. In deciding to apply strict scrutiny to a constitutional claim involving racial segregation in prisons, this Court relied on the fact that "[v]irtually all other States and the Federal Government manage their prison systems without reliance on racial segregation." *Johnson* v. *California*, 543 U.S. 499, 508 (2005).

The Court has relied on the experience of other prisons even at lower levels of scrutiny. In a case applying intermediate scrutiny, the Court said that "the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction." *Procunier* v. *Martinez*, 416 U.S. 396, 414 n.14 (1974). And even under the highly deferential form of rational basis review applied to prisoners' constitutional claims, this Court has looked

to the practice of federal prisons to establish "obvious, easy alternatives" to a challenged state regulation. *Turner*, 482 U.S. at 98.

The experience of other prisons is relevant *a fortiori* under RLUIPA's standard of compelling interest and least restrictive means. Most courts of appeals applying RLUIPA require prison officials to explain why solutions that work in other jurisdictions would not work in theirs. Thus, in *Garner* v. *Kennedy*, 713 F.3d 237, 247 (5th Cir. 2013), the court found it "persuasive that prison systems that are comparable in size to Texas's — California and the Federal Bureau of Prisons — allow their inmates to grow beards, and there is no evidence of any specific incidents affecting prison safety in those systems due to beards." Similarly, in *Warsoldier* v. *Woodford*, 418 F.3d 989, 999 (9th Cir. 2005), where a Native American prisoner sought a religious exemption from restrictions on long hair, the court found no compelling interest, in part because "[p]risons run by the federal government, Oregon, Colorado, and Nevada all meet the same penological goals without such a policy."

This reasoning has not been limited to grooming cases. In a case of a prisoner prohibited from preaching during worship services, prison officials failed strict scrutiny "in the absence of any explanation * * * of significant differences between [defendant's prison] and a federal prison that would render the federal policy unworkable." *Spratt* v. *R.I. Dep't of Corr.*, 482 F.3d 33, 42 (1st Cir. 2007). And in a challenge to a rule limiting the number of religious books a prisoner could keep in his cell, defendants failed strict scrutiny in part because their "other institutions" did not enforce a similar rule. *Washington* v. *Klem*, 497 F.3d 272, 285 (3d Cir. 2007); *accord Shakur* v. *Schriro*, 514 F.3d 878, 890

(9th Cir. 2008) (reinstating a claim against Arizona officials where the plaintiff "point[ed] to a prison in Washington State that apparently serves a Halal meat diet to Muslim inmates 'that is minimally more expensive than the standard diet'") (citation omitted).

Even in the Eighth Circuit, a recent decision relied on the practice of prisons in other jurisdictions: "widespread allowance of tobacco in prison lends substantial credence to [the inmates'] position that less restrictive alternatives to a complete ban on the use of tobacco in Lakota religious ceremonies [are] possible." *Native Am. Council of Tribes* v. *Weber*, No. 13-1401, 2014 WL 1644130, at *8 (8th Cir. Apr. 25, 2014) (quoting district court; alterations by Eighth Circuit). But as further explained in Section III.D, *infra*, the Eighth Circuit took the opposite view in this case. J.A. 186-87.

This Court made a similar point in *O Centro*. There, the plaintiffs sought a religious exception from federal drugs laws for the use of hoasca, a sacramental tea containing a hallucinogenic drug. 546 U.S. at 425-26. As in this case, the government claimed a compelling interest in refusing a religious exception. But the Court unanimously rejected the government's defense as unproven. The Court relied in part on the fact that federal drug laws contained an exception for religious use of peyote, *id.* at 433-34, and on the fact that the Attorney General had authority to create additional exceptions, *id.* at 432-33. These exceptions undermined the government's claim of compelling interest for much the same reason that exceptions in other prison systems do here: They show from actual experience that uniform, no-exceptions enforcement of the challenged rule is not necessary to further a compelling government interest.

2. In this case, at least forty-four American prison systems would permit petitioner's half-inch beard, either for all prisoners or for prisoners with religious reasons to grow a beard. Sidhu, 66 U. Miami L. Rev. at 964-72. Forty-one jurisdictions — thirty-nine states, the United States, and the District of Columbia — permit beards with no fixed length limitations; three permit beards with length limitations of a half inch or more. *Ibid.*

Of the forty-one jurisdictions without length limitations, thirty-four permit beards for *all* prisoners; seven (Arizona, New Mexico, New York, North Dakota, Ohio, Pennsylvania, and West Virginia) restrict beards but allow religious exemptions. Two of these seven permit *all* prisoners to grow beards longer than what petitioner seeks — an inch in New York and three inches in Pennsylvania; the religious exemption is for prisoners who require even longer beards. *Id.* at 968-69. And since Professor Sidhu's article was published, Ohio amended its rules and now permits beards for all prisoners, with no length limits. Ohio Admin. Code 5120-9-25(F).

Three jurisdictions have length limitations: Idaho (half an inch), Mississippi (half an inch), and Indiana (1-1/2 inches). Sidhu, 66 U. Miami L. Rev. at 971-72. But since Professor Sidhu's article was published, Indiana has repealed its length limitation and now allows beards of any length. Indiana Department of Correction, Policy and Administrative Procedures, 02-01-104(X), http://www.in.gov/idoc/files/02-01-104_AP_Offender_Grooming____11-1-2013.pdf. These three states bring to forty-four the number of prison systems that would permit petitioner's half-inch beard. And

forty-two of those jurisdictions (all but Idaho and Mississippi) permit beards *longer* than the half inch that petitioner seeks.

These jurisdictions typically require the beard to be kept "neat and clean." Sidhu, 66 U. Miami L. Rev. at 964-70. Some impose qualitative limits for hygiene, sanitation, identification, or security, which enable them to deal with any actual problems on a case-by-case basis. *Id.* at 965-70 (Illinois, Kansas, Maryland, Massachusetts, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Pennsylvania, Tennessee, Washington, Wisconsin, and Wyoming). But they do not have rules that simply prohibit beards, and few limit beards to some arbitrary length.

Only seven or eight jurisdictions would prohibit petitioner's half-inch beard: Alabama, Arkansas, Florida, Georgia, South Carolina, Texas, Virginia, and possibly Louisiana. Even in most of these states, beards are not completely prohibited. Four (Alabama, Arkansas, Florida, and Georgia) allow beards for medical reasons. *Id.* at 970-71; J.A. 164; pp. 2-3, *supra*.

A fifth state (Texas) has been enjoined under RLUIPA to allow a Muslim inmate to grow a quarter-inch beard. *Garner* v. *Kennedy*, 713 F.3d 237 (5th Cir. 2013). A sixth (Virginia) lost a similar appeal, *Couch* v. *Jabe*, 679 F.3d 197 (4th Cir. 2012), and now allows all inmates to grow quarter-inch beards.[5] In both cases, the plaintiff prisoners received all the relief they requested. See *Garner*, Appellee's Brief 2; *Couch*, 679

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[5] Virginia Department of Corrections, Operating Procedure: Offender Grooming and Hygiene, No. 864.1 § IV.F.1 (2013), at http://vadoc.virginia.gov/about/procedures/documents/800/864-1.pdf.

F.3d at 199. It was the plaintiffs' caution and defendants' resistance to more than minimal change, and not any holding of the courts, that limited the beards in these cases to a quarter inch.

A seventh state (Louisiana) has a grooming policy that appears not to mention beards at all. Sidhu, 66 U. Miami L. Rev. at 972. Because the policy on hair is quite restrictive in tone, we assume that *perhaps* it is interpreted to also apply to facial hair. Only one state (South Carolina) clearly prohibits all beards. *Ibid.*

Large municipal corrections systems also allow beards. For example, New York City, which has a jail population nearly as large as Arkansas's prisons,[6] allows prisoners to "adopt hair styles, including facial hair styles, of any length." Rules of the City of New York, ch. 1, tit. 40 § 1-103(e)(1), at 5 (2008), http://www.nyc.gov/html/boc/downloads/pdf/minimum_standards.pdf.

3. The American Correctional Association (ACA) also recommends that prisoners be allowed to grow beards. The ACA, in cooperation with the Commission on Accreditation for Corrections, promulgates widely followed *Standards for Adult Correctional Institutions* (4th ed. 2003). One of respondents' witnesses recognized the ACA as a source of training, J.A. 101, and respondents' policies cite ACA standards as relevant.

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[6] See City of New York Department of Correction, *Department of Correction*, at 2, http://www.nyc.gov/html/ops/downloads/pdf/pmmr2014/doc.pdf (FY2012 average daily inmate population was 12,287); Arkansas Department of Correction, *Annual Report 2012*, at 1, http://adc.arkansas.gov/resources/Documents/2012_Annual_Report_final.pdf (inmate population at the end of FY2012 was 14,805); *cf.* J.A. 102 (respondents' witness estimating 15,000 to 17,000).

See Administrative Directive 98-04, Department of Correction Regulation 840, App., *infra*, 12a, 14a.

Standard 4-4283, entitled "Freedom in Personal Grooming," provides that: "Written policy, procedure, and practice allow freedom in personal grooming except when a valid interest justifies otherwise." *Standards* at 77. The official comment states: "Inmates should be permitted freedom in personal grooming as long as their appearance does not conflict with the institution's requirements for safety, security, identification, and hygiene. All regulations concerning personal grooming should be the least restrictive necessary." *Ibid.*

The lack of detail in the stated exception leaves some exploitable ambiguity, but the plain tenor of this standard is against restrictive grooming rules. Understandably, respondents' grooming policy does not cite this standard.[7] This standard supports the many state prison rules that permit beards with no fixed length limit but with a power to deal with any issues of security or hygiene if they ever arise. This standard has been in effect, in nearly identical language, for more than thirty years; it originated as Standard 2-4335 in 1981. *Standards for Adult Correctional Institutions* 87-88 (2d ed. 1981). And this is for all prisoners, not just for those with religious needs.

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[7] Defendant's Administrative Directive 98-04 cites only the ACA's standard on personal hygiene supplies, which was Standard 3-4324 in the third edition and Standard 4-4342 in the fourth edition. App., *infra*, 12a, 14a. It conspicuously avoids citing the ACA's standard on "Freedom in Personal Grooming," which was Standard 3-4270 in the third edition and Standard 4-4283 in the fourth edition.

4. It is almost impossible to imagine a compelling interest in refusing religious exceptions to a rule that is in tension with accreditation standards and that forty-four jurisdictions reject. Certainly respondents cannot "demonstrate[]" a compelling interest without considering the experience in these jurisdictions and producing actual evidence of problems caused by half-inch beards.

But respondents' witnesses knew nothing of that experience and had shown no interest in learning. Petitioner asked why Arkansas could not do what other states did. J.A. 101-02, 105-06. Respondents' counsel asked one of them what he knew about the practice in other states. J.A. 119. The magistrate asked. J.A. 110-11, 127. They knew nothing:

> Q [by Ms. Cryer, counsel for respondents] Are you aware of what other states are doing, how they run their facilities, or what types of rules that they have?
>
> A [Mr. Harris] No, ma'am, not specifically. I'm really not.

J.A. 119.

> THE COURT: * * * Last question, the Ninth Circuit case, it appears that they have a grooming policy and then the Ninth Circuit allowed this beard, half inch beard, have you had any sort of correspondence, any training, or anything based on that, that the California officials have mentioned or come and spoken at any conference or anything, have they talked about what the impact has been in their prison system?

> THE WITNESS [Mr. Lay]: No, sir, I haven't had an opportunity to visit with anyone about that. As a matter of fact, I wasn't aware of that case until this came up.

J.A. 110-11. Accord J.A. 101 ("I can't tell you for what reason they've elected or chosen to go that route."); J.A. 105 ("I don't know what goes on nationally across the country"). The case the magistrate asked about, *Mayweathers*, 328 F Supp. 2d 1086, was then 7-1/2 years old.

Mr. Harris responded to the same question: "I haven't heard anything, any consequences or — or feedback on since what happened in California, and I'm trying to recall anything negative or positive about their grooming change * * * " J.A. 127.

5. Mr. Lay testified that the Cummins Unit, where petitioner was then housed, was different from prisons in California and New York because it has a farm and open barracks instead of cells. J.A. 101-02. See *Smith* v. *Ark. Dep't of Corr.*, 103 F.3d 637, 640 (8th Cir. 1996) (describing an open dormitory in the Cummins Unit that housed 86 inmates with no guard). In *Smith*, and apparently in the usage of prison administrators, these open sleeping rooms are often called "dormitories." See *id.* at 640, 642.

Mr. Lay did not explain the relevance of these allegedly unusual features of the Cummins Unit. Presumably he meant that open barracks and farm labor create more opportunities for one prisoner to pass contraband to another. But when large numbers of inmates are left unguarded, they do not need beards to enable them to pass contraband. And respondents' ban on beards is not limited to the Cummins Unit; it applies to every unit, whether or not it has a farm and

open barracks. In fact, after the record closed, respondents moved petitioner to the Varner Unit, where he is housed in a one-man cell and is still subject to the rule against beards.

More fundamentally, prison farms and open barracks are hardly unique to the Cummins Unit. Open barracks or dormitories are ubiquitous,[8] and farms are common.[9] Thus, this testimony only underscores that

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[8] See, *e.g.*, Federal Bureau of Prisons, *About Our Facilities*, http://www.bop.gov/about/facilities/federal_prisons.jsp (minimum security federal prison camps "have dormitory housing"; low security institutions have "mostly dormitory or cubicle housing"); California Department of Corrections and Rehabilitation, *Corrections: Year at a Glance* 13, 39 (2011), http://www.cdcr.ca.gov/News/docs/2011_Annual_Report_FINAL.pdf (29.8% of California inmates—or roughly two times Arkansas's entire prison population—are in housing custody level 1 or 2, which involve "[o]pen dormitories"); New York Department of Corrections and Community Supervision, *Occupancy, Staffing and Safety*, http://www.doccs.ny.gov/FactSheets/Occupancystaffingandsafety09.html (New York prisons have "numerous open dormitories and housing units at more than 50 correctional facilities. In prototype dorms, 60 inmates sleep in one large room."); James Peguese & Robert Koppel, *Managing High-Risk Offenders in Prison Dormitory Settings* (2003), http://www.aca.org/publications/ctarchivespdf/july03/peguese.pdf ("dormitory housing has grown nationwide").

[9] See, *e.g.*, Mississippi Department of Corrections, *Division of Institutions State Prisons*, http://www.mdoc.state.ms.us/division_of_institutions%20State%20Prisons.htm (reporting that prisoners worked 75,000 man-days on prison farm in 2012); Ohio Department of Rehabilitation and Correction, *Agricultural and Farm Services*, http://www.drc.ohio.gov/web/ag_farm.htm (describing operations on 19,000 acres of prison farm land); Oklahoma Department of Corrections, *2012 Yearbook* 69-70, http://www.ok.gov/doc/documents/2012%20yearbook.pdf (reporting that Oklahoma prisoners produced more than 1.1 million pounds of vegetables, 2.9 million pounds of meat, and large quantities of dairy products in 2012); see also California, *Corrections*

respondents' witnesses knew little or nothing about other prison systems. The allegedly unusual conditions at the Cummins Unit are not at all unusual, and they do not explain why rules that work in forty-four other jurisdictions would not work in Arkansas.

6. The Eighth Circuit treated the experience of other jurisdictions as nearly irrelevant: "although prison policies from other jurisdictions provide some evidence as to feasibility of implementing less restrictive means of achieving prison safety and security, it does not outweigh deference owed to expert judgment of prison officials who are more familiar with their own institutions." J.A. 186-87 (citing *Fegans*, 537 F.3d at 905).

The Eighth Circuit also said that courts must defer to prison officials "absent substantial evidence in record indicating that response of prison officials to security concerns is exaggerated." J.A. 186 (citing *Fegans* 537 F.3d at 903). In other words, the Eighth Circuit did not require respondents to prove a compelling interest in enforcing a rule that forty-four other jurisdictions do not enforce. Rather, it required *petitioner* to disprove respondents' claim of compelling interest with "substantial evidence," and it held that the evidence of many other jurisdictions was not sufficiently substantial. This rule impermissibly reverses

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Year at a Glance, *supra* note 8, at 19 (describing work of 4,200 inmates in "Conservation Camps," where inmates provide fire suppression, flood and earthquake response, and other emergency services); North Carolina Department of Public Safety, *Dan River Prison Work Farm*, https://www.ncdps.gov/index2.cfm?a=000003,002240,002371,002384,002289 (describing how prisoners operate a farm, pick up litter, and restore forests, parks, and lakes "all across North Carolina"). All of these states would allow petitioner's half-inch beard.

RLUIPA's explicit allocation of the burdens of going forward with the evidence and of persuasion. 42 U.S.C. §§ 2000cc-1(a); 2000cc-5(2); see also *O Centro*, 546 U.S. at 428 (applying the identical provision of RFRA, 42 U.S.C. § 2000bb-2(3)).

B. Respondents' Implausible and Conclusory Testimony Proved Neither Compelling Interest Nor Least Restrictive Means.

Respondents' witnesses offered four reasons why they could not permit a half-inch beard, even for religious reasons. None of these reasons withstands analysis. Considered separately or in combination, they do not come close to showing that respondents' ban on beards is the least restrictive means of furthering a compelling interest.

1. Hiding contraband.

a. Respondents' witnesses testified that prisoners can hide contraband in a half-inch beard. J.A. 80, 84-85, 116-17, 123, 126. This is the testimony that the magistrate found "almost preposterous." J.A. 155. They gave no examples of anyone ever having actually hidden contraband in any beard of any length, let alone a half-inch beard.

Mr. Harris particularly emphasized cell-phone SIM cards, and he brought one with him. The magistrate measured the SIM card at 9/32 by 13/32 of an inch. J.A. 129. That is less than a tenth of an inch shorter than petitioner's beard. J.A. 129. Mr. Harris did not explain how petitioner could have put this object into his beard, made it stay in place, and ensured that it would not be visible at any point.

b. The question is not whether it is conceivably possible to hide some extremely small thing in a half-inch

beard. It cannot be that any incremental change in risk, however slight, furthers a compelling interest — much less that it does so by the least restrictive means. That approach would justify almost any imaginable restriction on prisoners and render RLUIPA a dead letter. "[T]he government does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown* v. *Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741 n.9 (2011); see also *Bolger* v. *Young Drug Prods. Corp.*, 463 U.S. 60, 73 (1983) (a rule that "provides only the most limited incremental support" for the government's interest is not justified even under the more relaxed standards for laws regulating commercial speech).

The question is whether a half-inch beard significantly expands an inmate's ability to conceal contraband, or put another way, whether the government has carried its burden of demonstrating that allowing half-inch beards for religiously motivated inmates would increase the flow of contraband in the prison — and not just trivially or incidentally. Respondents' evidence gives no reason to believe that the flow of contraband would increase in the slightest.

c. Respondents' witnesses agreed that prisoners hide contraband in many places, including clothes, socks, shoes, boots, coats, and body cavities. J.A. 98, 115. The SIM card "can be concealed just about anywhere." J.A. 116. Pieces of phones "have been walked down the hall in flip flops." *Ibid.* Officers smuggle contraband for prisoners. J.A. 122, 132. "[T]here's many different ways" for contraband to enter the prison. J.A. 132. "They do hide it in a lot of different places." J.A. 106. "There's many ways" to carry or pass contraband, and the half-inch beard is not the only one, "not by a long shot." J.A. 126.

Although respondents' grooming policy prohibits hair that reaches below the middle of the nape of the neck, it does not limit the length or quantity of hair on top of the head. See Administrative Directive 98-04.B, App., *infra*, 11a. Responding to petitioner during cross-examination, Mr. Lay said that "you could hide something in hair the length of yours or mine, but that's not excessive according to the policy." J.A. 106. That is, not even respondents believe that it is necessary or appropriate to eliminate every hiding place that could conceivably be eliminated. They do not require all prisoners to shave their heads, go naked, or dress only in Speedos. The difference between permitting substantial hair on top of the head and prohibiting all hair on the front of the face would seem to rest on little more than a vague sense of social convention.

d. Respondents were reduced to arguing that a half-inch beard provided one more place in which to hide things. J.A. 106, 126. If the magistrate is right that nothing could be hidden in a half-inch beard, then it does not even provide one more place. But if it does, that additional hiding place has no appreciable effect on the risk of concealed contraband, because there are ample other places to hide anything so small that it could conceivably be hidden in a half-inch beard.

The magistrate's assessment, and the other possibilities to which respondents' witnesses testified, show this extra hiding place to be an especially ineffectual one. It would be far easier and safer for a prisoner to drop a SIM card, or any other small item, in a shoe or a pocket or the hem or lining of his clothes. The item would be much better hidden, and gravity would work to pull the item to the bottom of its hiding place. If the same item were hidden in a half-inch beard, gravity

would work to pull it out of the beard and into plain view.

The magistrate fully recognized the significance of all these other hiding places. In his written recommendations, adopted by the District Judge, he said: "Although Plaintiff makes compelling arguments that an inmate could easily hide contraband in many places other than a one-half inch beard, the prison officials are entitled to deference." J.A. 168. Deference cannot trump evidence in this way, and cannot eliminate the government's obligation to "demonstrate[]" that its solution is necessary. No deference is due when testimony is implausible, there are "compelling arguments" to refute it, and the basis of those compelling arguments — the availability of many other hiding places — is undisputed. Courts are not required to believe the sky is falling just because prison officials say so.

Given the many other hiding places available to prisoners, and the clear superiority of most of those hiding places, permitting a religiously motivated half-inch beard would not increase the risk of contraband even incrementally. And as already noted, that cannot be the standard. Certainly respondents did not prove that prohibiting half-inch beards is the least restrictive means of furthering a compelling interest.

e. The availability of many other hiding places also renders respondents' policy substantially underinclusive, which further prevents them from demonstrating a compelling interest and least restrictive means. In *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 546-47 (1993), this Court held that a ban on animal sacrifice failed strict scrut[illegible]y because the city "fail[ed] to enact feasible measures to restrict

other conduct producing substantial harm or alleged harm of the same sort" — such as killing animals for other reasons and improper disposal of garbage by restaurants, *id.* at 543-45. As the Court explained, "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id.* at 547 (internal quotation and citation omitted).

The Court applied the same principle in *O Centro*, where it held that the government's interest in restricting hoasca was not compelling, because it already made an exception for peyote. 546 U.S. at 433 (quoting *Lukumi*). And courts of appeals have applied the same principle under RLUIPA, concluding that a prison's interest is not compelling when it permits substantial conduct that undermines that interest. See, *e.g.*, *Yellowbear*, 741 F.3d at 60 (prison lacked a compelling interest in refusing lock downs for religious needs when it used lock downs for medical needs); *Couch*, 679 F.3d at 204 (prison officials failed "to explain how the prison is able to deal with the beards of medically exempt inmates but could not similarly accommodate religious exemptions"); *Washington*, 497 F.3d at 283-84, 285 (prison had no compelling interest in a ten-book limit when it allowed larger amounts of newspapers, magazines, and other personal property); *Spratt*, 482 F.3d at 42 (prison lacked a compelling interest in stopping inmates from preaching when they were "free to become leaders under other circumstances").

Here, where the prison does not eliminate numerous hiding places that are clearly superior to a half-inch beard — including clothes, socks, shoes, boots, and coats — and does not eliminate other potential hiding places that are at least no worse than a half-

inch beard — such as hair on top of the head — its interest in eliminating a half-inch beard is not compelling.

f. Nor is a complete ban on half-inch beards the least restrictive means. If respondents believe it is possible to hide things in a half-inch beard, its officers can search the beard — just like they search any other potential hiding place. And if officers are reluctant to run their hands through a prisoner's beard, J.A. 98-99, they can direct prisoners to vigorously run their own hands through their beards to dislodge anything hidden there. Respondents have ample means to enforce such an order: "Failure to obey verbal and/or written orders of staff" is a serious offense for prisoners, subject to the highest class of penalties. Ark. Admin. Code 004.00.1-III(B)(12-1) (stating the rule and its penalty class); *id.* at (C)(1)(a) (specifying the penalties for that class).

Respondents can also require inmates to shave their beard if contraband is ever found there. They already do this for contraband hidden in the hair: "If at any time concealment of contraband is detected in the hair, the warden/center supervisor may prescribe an individual grooming policy." Ark. Admin. Code 004.00.1-I(C)(6). In other words, respondents do not fight contraband in the hair by requiring all prisoners to shave their heads. Rather, they deter such conduct by threatening to take away a prisoner's right to choose his own hair style, and they end his ability to hide contraband there if he abuses the choice.

There is no reason why this less restrictive rule could not apply to beards. For prisoners with sincerely held religious obligations to wear a beard, the deterrent effect of threatening to shave the beard would be

substantial — indeed it would likely be greater than the deterrent effect on other inmates of threatening to shave their head. And for any inmate, shaving the beard would eliminate the possibility of a repeat violation.

Other states apply just such rules to beards. Missouri's rules, for example, permit all prisoners to "have whatever hair and beard length they prefer;" require prisoners to comply with instructions pertaining to searching their beards; and provide for shaving the beard if contraband is concealed there. Sidhu, 66 U. Miami L. Rev. at 966; see also Ohio Admin. Code 5120-9-25(J) ("The rules infraction board may indefinitely restrict the style or length of hair of any inmate who is convicted of concealing contraband in his hair or facial hair * * * "). Other prison systems similarly permit beards but explicitly leave room to address hygiene or security issues case-by-case if they ever arise. See p. 25, *supra*.

2. Changing appearance.

Mr. Lay testified that escaped prisoners can alter their appearance by shaving their beards. J.A. 80, 96. He provided no examples of this ever having happened in any jurisdiction. He described only one incident thirty or forty years ago in which a clean-shaven prisoner escaped and then grew a beard. J.A. 104-05. "Of course, that went the other way around." J.A. 104.

Petitioner asked each witness why they could not require a clean-shaven photograph of each prisoner on admission, and a second photograph if he grew a beard. Mr. Lay gave a nonresponsive answer, simply listing ways in which inmates might change their appearance, and describing the problem that would exist if the prison were not permitted to require the initial

clean-shaven photo. J.A. 104. Mr. Harris said only that Warden Lay had already answered that question, and immediately returned to talking about contraband. J.A. 123. Neither offered any reason why it would be insufficient to take a clean-shaven photograph and a photograph with a beard.

In fact, respondents already require a photograph when the prisoner enters an institution and a new photograph whenever "the growth or elimination of hair, mustaches, sideburns and/or beard significantly changes your [an inmate's] appearance." Ark. Admin. Code. 004.00.1-I(C)(6). Other prison systems do the same;[10] Virginia adds a second rule, which specifically

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[10] See, *e.g.*, Cal. Code Regs. tit. 15, § 3019 ("An inmate may also be charged for replacement of [an identity] card if a physical change in the inmate's appearance is a matter of his or her own choice and the change occurs within six months of the issue of a new or replacement card."); Ill. Admin. Code tit. 20, § 502.110(b) ("If the growth, elimination, or color change of hair, mustache, sideburns, or beard significantly changes the individual's appearance, a new identification photograph shall be taken."); Indiana Policy, § 02-01-104.X, http://www.in.gov/idoc/files/02-01-104_AP_Offender_Grooming____11-1-2013.pdf ("When a significant change occurs in an offender's appearance, a new identification picture shall be made."); N.Y. Comp. Codes R. & Regs. tit. 7, § 270.2(B)(11)(v) (Rule 100.31) ("An inmate shall pay the cost of a replacement ID card whenever the inmate's appearance is changed as a result of a beard, mustache, or change in hair length or color."); Ohio Admin. Code 5120-9-25(G) ("A new photo shall be taken whenever in the judgment of the managing officer or designee any significant change in physical appearance has taken place. Rephotographing shall be at the inmate's expense if the change in appearance is occasioned by grooming changes."); Va. Operating Procedure 864.1, *supra* note 5, § IV.B.6.a (2013) ("To insure a current likeness, identification photographs for inclusion in permanent records and on offender identification cards will be updated whenever an offender's appearance changes.").

requires a clean-shaven photograph of any prisoner who grows a beard.[11]

Moreover, respondents do not explain how their interest in identifying prisoners can be compelling when it comes to beards worn for religious reasons, but is not compelling when it comes to quarter-inch beards worn for medical reasons. In *Fraternal Order of Police Newark Lodge No. 12* v. *City of Newark*, 170 F.3d 359 (3d Cir. 1999) (Alito, J.), the Third Circuit confronted a similar situation and held that a police department had no compelling interest in prohibiting officers from wearing beards grown for religious reasons when it already allowed beards grown for medical reasons. As the court explained: "The Department does not contend that these medical exemptions pose a serious threat to the safety of the members of the force or to the general public, and there is no apparent reason why permitting officers to wear beards for religious reasons should create any greater difficulties in this regard." *Id.* at 366. Here, there is no reason why permitting petitioner to wear a quarter-inch beard for medical reasons would not create the same supposed identification difficulties as a half-inch beard for religious reasons.

3. Measuring half an inch.

Mr. Lay testified that it would be difficult to determine the length of beards and to manage half-inch

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[11] Va. Operating Procedure 864.1, *supra* note 5, § IV.B.6.d ("Each offender who desires to have a beard shall notify the Unit manager (major institutions) or Lieutenant (field units and work centers) so that separate identification photos can be maintained in VACORIS showing the offender without facial hair and with facial hair.").

beards for 15,000 prisoners. J.A. 80, 107. But respondents already allow quarter-inch beards for medical reasons. J.A. 80, 164. They do not explain how they can administer a quarter-inch limit but not a half-inch limit, and no explanation is possible. As Mr. Lay volunteered, "you could start, I guess, with a particular clipper guard that's a particular length." J.A. 84. Or the warden's office could keep a ruler, or a popsicle stick or tongue depressor with a half-inch mark, in case of any dispute.

It is also absurd to predict that all 15,000 prisoners will want to grow beards. Most men do not want beards, and only those with religious motivations are protected by RLUIPA. The magistrate dismissed Mr. Lay's fear of "having to manage 15,000 people with beards" as not at issue. J.A. 103. Yet Mr. Harris still refused to concede that "not every inmate in the Department of Correction is going to grow a beard." J.A. 122-23. This kind of testimony does not demonstrate a compelling interest. Rather, it demonstrates that respondents refused to take RLUIPA or petitioner's claim seriously, and were willing to give wholly implausible testimony in support of imaginary problems.

Mr. Lay also testified about a dispute between petitioner and an inmate barber who cut his beard too short. J.A. 81-83. Petitioner testified that the barber "tried to shave it nearly all the way off," even after petitioner twice told the barber that he had a court order permitting a half-inch beard. J.A. 70-71. Mr. Lay testified that the barber claimed that petitioner had told him nothing. J.A. 82. The barber did not testify, and the magistrate made no findings concerning the incident.

What is clear from the testimony of both witnesses is that this was not a dispute about the meaning of half an inch. Rather, this was a misunderstanding (the barber's alleged view) or disregard (petitioner's view) of petitioner's right to have a half-inch beard at all. The incident does not show any difficulty in trimming a half-inch beard, let alone that no prisoner should ever be permitted a beard, any more than a dispute over a bad haircut shows that all inmates should shave their heads.

If half-inch clippers, measuring sticks, and general familiarity with half an inch are not enough, respondents could also provide guards, prisoners, and barbers with a sketch or photograph of a compliant half-inch beard. At least one state already does this for rule-compliant haircuts. Sidhu, 66 U. Miami L. Rev. at 963 (reprinting Alabama's sketch).

Or respondents could do what most prison systems do: abandon any limit stated in inches and impose a qualitative limit on beards so long or so tangled that they actually create a significant potential hiding place. See p. 25, *supra*. By asking for only half an inch, petitioner has asked for an extremely conservative compromise. But if there is another solution that gives him as much or more relief and is easier for respondents to administer, they remain free to adopt the less restrictive alternative.

4. No exceptions ever.

Respondents' witnesses testified that allowing petitioner an exemption that was not available to other inmates might generate a reaction that could endanger him, or alternatively, make him a leader of inmates. J.A. 86-87, 118-19. Asked about "any inmate that is allowed to do something that other inmates are

not allowed to do," Mr. Harris answered, "That's the last thing you would want to happen in an institution." J.A. 118. Respondents again failed to offer any examples, and Mr. Harris acknowledged that petitioner had neither been targeted nor become a leader because of his beard. J.A. 121. Nor have respondents explained how they could allow beards for medical reasons even though possessing a medically-motivated beard is also "something that other inmates are not allowed to do." J.A. 118.

Nothing better illustrates respondents' refusal to take RLUIPA seriously than their claim that they can never make exceptions for anything. RLUIPA "plainly contemplates that courts would recognize exceptions — that is how the law works." *O Centro*, 546 U.S. at 434 (describing identical language of RFRA) (emphasis omitted). A law that requires religious exceptions necessarily rejects respondents' claim of a compelling interest in never granting any exception to anyone for anything.

5. Failure to consider less restrictive means.

We have organized this discussion in terms of the facts, without separately assigning each factual detail to the compelling-interest issue or the least-restrictive means issue. In light of those facts, respondents failed to demonstrate that refusing religious exceptions to their ban on half-inch beards is necessary to further any compelling government interest.

But they also failed to seriously consider and address "obvious, easy alternatives" to their policy. *Turner*, 482 U.S. at 98. Prison officials are required to explain why such alternatives would not work even under the deferential *Turner* standard of bare rational

basis review. *Ibid. A fortiori*, consideration of alternatives is required under RLUIPA's strict-scrutiny standard. *Cf. Fisher* v. *Univ. of Tex.*, 133 S. Ct. 2411, 2420 (2013) (requiring university to consider efficacy of race-neutral means to achieve compelling interest in diversity before considering race in admissions). Indeed, "the phrase 'least restrictive means' is, by definition, a relative term. It necessarily implies a comparison with other means." *Washington*, 497 F.3d at 284.

Thus, several circuits have held that a prison "cannot meet its burden to prove least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Shakur*, 514 F.3d at 890 (quoting *Warsoldier*, 418 F.3d at 999); *Spratt*, 482 F.3d at 41 (same); *Couch*, 679 F.3d at 203 (government must "acknowledge and give some consideration to less restrictive alternatives"); *Washington*, 497 F.3d at 284 ("Government must consider and reject other means before it can conclude that the policy chosen is the least restrictive means."). This consideration must be "serious" and in "good faith." *Fisher*, 133 S. Ct. at 2420 (quoting *Grutter* v. *Bollinger*, 539 U.S. 306, 339 (2003)). "[T]he government's burden here isn't to *mull* the claimant's proposed alternatives, it is to *demonstrate* the claimant's alternatives are ineffective to achieve the government's stated goals." *Yellowbear*, 741 F.3d at 63 (emphasis in original).

Here there are many less restrictive alternatives to banning petitioner's half-inch beard, and respondents failed even to "mull" them, much less demonstrate that they are ineffective. The less restrictive means discussed above include:

With respect to contraband, respondents could:

1. Search beards as they search everything else about prisoners.
2. Order inmates to vigorously run their own hands through their beards.
3. Impose qualitative limits on long or tangled beards.
4. Require any inmate caught hiding contraband in his beard to shave.

With respect to identifying prisoners, respondents could:

1. Require a new photograph whenever an inmate changes his appearance.
2. Require an initial clean-shaven photograph of any inmate who grows a beard.

With respect to administering a rule permitting half-inch beards, respondents could:

1. Provide inmate barbers with half-inch clipper guards, and if necessary, train those barbers in their use.
2. Give guards and barbers a sketch or photograph of faces with compliant half-inch beards.
3. Keep a ruler or other measuring stick in the warden's office.
4. Use the same methods they already use to administer the quarter-inch limit on medical beards.

Respondents' witnesses reflexively rejected, without serious thought, every argument for half-inch beards. They claimed expertise but knew nothing of experience elsewhere or of the views of the American

Correctional Association. Their testimony was variously implausible, illogical, evasive, and "almost preposterous." J.A. 155. They simply refused to take seriously the possibility that RLUIPA may sometimes require exceptions to prison rules. Such testimony does not come close to proving a compelling government interest or least restrictive means.

C. Due Deference To Prison Administrators Cannot Create a Compelling Interest.

1. The courts below gave essentially unlimited deference to anything respondents said. They deferred to testimony that was "almost preposterous," J.A. 155; they deferred despite "compelling arguments" to the contrary, J.A. 168; they deferred despite the contrary practice of many other jurisdictions, J.A. 186-87.

Such unlimited deference is the wrong legal standard, and it effectively negates the statute. RLUIPA's legislative history contemplates "due deference to the experience and expertise of prison and jail administrators." Joint Statement of Senators Hatch and Kennedy, 146 Cong. Rec. at 16699 (quoting S. Rep. 103-111 at 10 (1993)). But it does not say how much deference is due. And "due deference" cannot overcome respondents' failure to demonstrate a compelling interest or least restrictive means.

2. "Congress's 'authoritative statement is the statutory text, not the legislative history.'" *Chamber of Commerce* v. *Whiting*, 131 S. Ct. 1968, 1980 (2011) (quoting *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005)). The statutory text of RLUIPA says nothing about deference. Respondents' claim to deference is based solely on legislative history,

and however much or little weight is given to legislative history, that history must be understood in a way that is consistent with the statutory text.

3. Even considered apart from the statutory text, RLUIPA's legislative history does not support giving any deference to these respondents, much less the great deference accorded them in the courts below. The legislative process that culminated in RLUIPA is summarized in the Joint Statement, which was the manager's statement on the bill, 146 Cong. Rec. at 16698. Congress enacted RLUIPA after conducting nine hearings over three years. *Ibid.*

The Joint Statement reported that "prison officials sometimes impose frivolous or arbitrary rules" and "restrict religious liberty in egregious and unnecessary ways." *Id.* at 16699. Among its illustrations were a case of jail officials who secretly recorded a sacramental confession, *Mockaitis* v. *Harcleroad*, 104 F.3d 1522, 1525 (9th Cir. 1997), and an unreported case in which a prisoner was allowed to attend Episcopal worship services but forbidden to take communion. 146 Cong. Rec. at 16699. The House report noted cases of institutions feeding pork to all prisoners, refusing to buy matzo at Passover, and even refusing offers of *free* matzo at Passover. H.R. Rep. 106-119 at 9-10. See also *Cutter*, 544 U.S. at 716 n.5 (noting examples gathered from testimony at just two of these hearings, including refusal to honor religious dietary rules, refusal to allow communion wine, and seizure or destruction of scriptures and other religious items). Plainly Congress contemplated no deference to rules or practices such as these.

But the reach of the Act is not limited to such egregious violations. The same committee report that first

mentioned due deference also repeatedly paraphrased the compelling-interest test for application to prison cases. "[O]nly regulations based upon penological concerns of the 'highest order' could outweigh an inmate's claims." S. Rep. 103-111 at 10. And the specific quotation that invoked due deference immediately continued: "At the same time, however, inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements." 146 Cong. Rec. at 16699 (quoting S. Rep. 103-111 at 10).

Courts must exercise independent judgment to distinguish genuine expertise from speculation, exaggeration, and rationalization. They must decide when expertise is genuine and how much deference is "due."

4. The legislative history says that courts will give "due deference to the experience and expertise of prison and jail administrators." Joint Statement of Senators Hatch and Kennedy, 146 Cong. Rec. 16699 (quoting S. Rep. 103-111 at 10 (1993)). It does not say deference "to the defendants in each case." It does not even say deference "to prison administrators." It says deference "to the *experience and expertise*" of prison administrators (emphasis added).

The leaders of the American Correctional Association, and of prisons in the forty-four jurisdictions that would permit petitioner's beard, are also prison administrators. It is equally consistent with the legislative history, and far more justified, to defer to the experience and expertise of all these prison administrators than to respondents' two witnesses. The cumula-

tive experience in forty-four jurisdictions is vast. If allowing beards had led to significant problems, forty-four American prison systems would not allow them.

Here, where prison officials could not support their opinions with any examples, and where they knew nothing about experience in many other prisons — experience that is contrary to their uninformed opinions — they have shown no expertise to which a court can defer. For these witnesses, no deference was due.

5. *Cutter* v. *Wilkinson* quoted the legislative history's mention of "due deference," 544 U.S. at 723, but it did not consider how deference should be operationalized. The case was before the Court on a motion to dismiss and a "thin record." *Id.* at 717. The Court considered a constitutional challenge, but no issue of statutory interpretation. The nature and extent of any deference to prison administrators remains to be determined.

No existing model of judicial deference is squarely applicable or controlling here. But two bodies of law offer suggestive analogies, and neither suggests any level of deference to these respondents.

The first useful analogy is the Court's familiar standards for pre-screening the reliability of expert-witness testimony. Fed. R. Evid. 702; *Daubert* v. *Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). These standards apply to testimony based on any form of "specialized knowledge," including knowledge based on "experience." *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 147-49 (1999); Fed. R. Evid. 702.

Both courts below deferred to the "expert judgment" of respondents' witnesses. J.A. 176, 186, 187 (quotation omitted). The magistrate emphasized the witnesses' long "experience," and their "knowledge,

which is pretty particular," *i.e.*, specialized knowledge. J.A. 155. Mr. Lay explicitly testified to his "opinion" at J.A. 85; more commonly, the witnesses described their opinions as their "concerns." J.A. 79-81, 83-84, 86, 96-97, 102, 106, 113-14, 116-19, 129-30, 134. This testimony was allegedly expert testimony within scope of Rule 702. Had the standards of *Daubert* and *Kumho Tire* been applied, most of this testimony would not have been admissible — let alone entitled to deference.

It is impossible to review the record in this case and conclude that the testimony of respondents' witnesses "'rests on a reliable foundation.'" *Kumho Tire*, 526 U.S. at 141 (quoting *Daubert*, 509 U.S. at 597). Respondents' witnesses relied on their own experience, but that experience offered no examples of the dangers they feared, and they offered no other basis for their opinions. They had no knowledge of experience in other prison systems. With at least forty-four prison systems rejecting their position, that position had little more than "minimal support" in the corrections community. *Daubert*, 509 U.S. at 594. Expert testimony requires some independent indicia of reliability, not just "the *ipse dixit* of the expert." *Kumho Tire*, 526 U.S. at 157 (quoting *Gen. Elec. Co.* v. *Joiner*, 522 U.S. 136, 146 (1997)). But *ipse dixits* — their own unsupported opinions — are all these witnesses offered.

6. Respondents would fare no better under *Skidmore* deference. *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). *Skidmore* is roughly analogous here because it defines the deference due to administrative agencies or executive branch officials that lack delegated authority "generally to make rules carrying the force of law." *United States* v. *Mead Corp.*, 533 U.S. 218, 226-

27 (2001).[12] However, even *Skidmore*'s level of deference has never been applied to judicial review of action subject to a strict-scrutiny standard.

Under *Skidmore*, courts defer only to the extent that expertise is actually demonstrated. "The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." *Mead Corp.*, 533 U.S. at 228 (citations omitted). Courts may look to "all those factors which give [an agency's position] power to persuade." *Univ. of Tex. Sw. Med. Ctr.* v. *Nassar*, 133 S. Ct. 2517, 2533 (2013) (quoting *Skidmore*, 323 U.S. at 140).

Respondents could not possibly prevail if the Court applied *Skidmore* deference. Respondents' witnesses did not support their opinions with standards, studies, data, or even examples, and they knew nothing of experience elsewhere. They lack expertise and deserve little or no deference.

7. Whatever sort of deference might be applied, it must be administered consistently with the statutory standard of compelling interest and least restrictive means. In close cases, where defendants have offered strong evidence but the court is uncertain whether

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[12] Congress plainly did not delegate to the state prison officials subject to RLUIPA any authority to issue legally binding rules interpreting RLUIPA. *Chevron* deference to respondents' interpretation of RLUIPA, and *Auer* deference to their interpretation of their own rules about RLUIPA, are therefore wholly inapplicable here. See *Mead Corp.*, 533 U.S. at 229-34; *Chevron (USA)* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997).

they have demonstrated compelling interest and least restrictive means, deference might "nudge a questionable case across the line." *Yellowbear*, 741 F.3d at 59. But deference does not mean "that prison officials may declare a compelling governmental interest by fiat." *Ibid.* As the Fourth Circuit said in another beard case, "a court should not rubber stamp or mechanically accept the judgments of prison administrators." *Couch*, 679 F.3d at 201 (quoting *Lovelace* v. *Lee*, 472 F.3d 174, 190 (4th Cir. 2006)). Otherwise, the mention of due deference in legislative history would override the statutory text.

Total deference to prison officials, with only lip service to compelling interest and least restrictive means, is not the statutory standard. The standard is compelling interest and least restrictive means, with the burdens of going forward with the evidence and of persuasion on respondents. This statutory standard must be "construed in favor of a broad protection of religious exercise." 42 U.S.C. § 2000cc-3(g). Any deference based on the legislative history must be consistent with that standard, so construed.

D. The Courts Below Applied the Deferential *Turner* Standard, Not the RLUIPA Standard.

The courts below did not apply the standard set forth in RLUIPA's text. They applied the deferential *Turner* standard, which applies only to constitutional claims. The very point of RLUIPA was to provide a statutory alternative to this standard.

1. The magistrate understood the Eighth Circuit's legal standard to be embodied in *Fegans*, 537 F.3d 897. And he understood *Fegans* to require him to rule for

respondents so long as they could "state" or "articulate" "legitimate penological needs." J.A. 154-55. But reasonable relationship to "legitimate penological interests" or "objectives" is the *Turner* standard. *Turner*, 482 U.S. at 87, 89; *O'Lone*, 482 U.S. at 349, 352 (applying *Turner* to prisoners' free-exercise claims). RLUIPA requires respondents to "demonstrate[]" their interests, not "state" or "articulate" them, and to demonstrate "compelling governmental interest" and "least restrictive means," not just any "legitimate" interest. 42 U.S.C. § 2000cc-1(a).

In his written recommendations, the magistrate eventually recited the statutory standard, J.A. 173, and recited that respondents had satisfied it, J.A. 176. But he mentioned the statutory standard only *after* he concluded that petitioner had little chance of success and *after* recommending that petitioner's motion for a preliminary injunction be denied. J.A. 169. He said that even under the statutory standard, "the court still affords a significant amount of deference to the expertise of prison officials." J.A. 174. At no point in his treatment of the evidence did he acknowledge or imply any functional difference between the statutory and constitutional standards.

2. The Eighth Circuit RLUIPA cases are mixed. Its most recent decision enforced the statute according to its terms. *Native Am. Council*, 2014 WL 1644130. But in this case, it disregarded RLUIPA's text and applied a standard drawn from prisoners' constitutional cases.

The Eighth Circuit required petitioner to disprove respondents' claims of compelling interest, and to do so with substantial evidence. J.A. 186. That rule is flatly inconsistent with the statute's explicit allocation of the burden of proof. See pp. 17, 31-32, *supra*. It is

taken, substantially verbatim, from *Pell* v. *Procunier*, 417 U.S. 817, 827 (1974). See J.A. 186 (citing *Fegans*, 537 F.3d at 903, which cited *Pell*). *Pell* was a constitutional case, and the first opinion in this Court to invoke "legitimate penological objectives," 417 U.S. at 822, which eventually became the core of the *Turner* standard.

In fact, the courts below applied a standard that was *more* deferential than *Turner*. This Court's constitutional cases engaged in substantial analysis of the challenged prison rules. *Turner*, 482 U.S. at 91-99; *O'Lone*, 482 U.S. at 350-53. In *Turner*, the Court unanimously struck down Missouri's ban on most prisoner marriages, despite testimony that the ban served security and rehabilitation interests. The Court found that testimony exaggerated, illogical, and unable to explain why the federal prison system's more individualized rule would not suffice. 482 U.S. at 97-99.

In contrast, the magistrate here reasonably understood the Eighth Circuit to require that he defer even to testimony that was "almost preposterous." J.A. 155. The Eighth Circuit summarized respondents' testimony in a single sentence, and its entire legal analysis of that testimony was contained in a second sentence. J.A. 185-87.

3. The illusory nature of RLUIPA review in the courts below is further illustrated by the courts' indifference to facts. As the magistrate explicitly recognized, this case was factually quite different from earlier Eighth Circuit cases. J.A. 154. Petitioner wanted only a half-inch beard; *Fegans* involved "shoulder-length hair" and a beard that was "uncut altogether." 537 F.3d at 904, 906. But facts didn't matter. After ac-

curately stating the factual distinctions, the magistrate immediately returned to his theme of deference. J.A. 154.

The Eighth Circuit affirmed on the authority of *Fegans*, J.A. 186-87, without even mentioning the factual differences between the cases. Petitioner's very limited request for relief required no independent analysis, because in this case, the Eighth Circuit applied a rule of effectively unlimited deference to prison officials.

* * * * *

RLUIPA, like RFRA, requires "case-by-case consideration of religious exemptions to generally applicable rules." *O Centro*, 546 U.S. at 436. It requires respondents to "demonstrate[]" that "imposition of the burden on [petitioner]" is "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000cc-1(a).

When forty-four American prison systems permit religious beards, when respondents were neither aware of these policies nor able to explain how their needs were different, and when the testimony in support of their policy was implausible, conclusory, and devoid of examples, respondents did not come close to carrying their burdens of production and persuasion.

CONCLUSION

The judgment should be reversed and the case remanded for further proceedings consistent with an opinion clearly stating that RLUIPA is to be enforced according to its terms and that respondents have wholly failed to prove either compelling interest or least restrictive means.

Respectfully submitted.

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MAY 22, 2014

APPENDIX

Statutory and Regulatory Provisions Involved

Religious Land Use and Institutionalized Persons Act

42 U.S.C. § 2000cc. Protection of land use as religious exercise.

[omitted]

42 U.S.C. § 2000cc-1. Protection of religious exercise of institutionalized persons

(a) General rule

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person —

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(b) Scope of application

This section applies in any case in which—

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of

that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

42 U.S.C. § 2000cc-2. Judicial relief

(a) Cause of action

A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under Article III of the Constitution.

(b) Burden of persuasion

[omitted; applies only to land-use and constitutional cases]

(c) Full faith and credit

[omitted; applies only to land-use cases]

(d) Omitted [by Congress]

(e) Prisoners

Nothing in this chapter shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

(f) Authority of United States to enforce this chapter

The United States may bring an action for injunctive or declaratory relief to enforce compliance with this chapter. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States,

acting under any law other than this subsection, to institute or intervene in any proceeding.

(g) Limitation

[omitted; applies only to cases where scope of statute's application is based on Commerce Clause]

42 U.S.C. § 2000cc-3. Rules of construction

(a) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

(b) Religious exercise not regulated

Nothing in this chapter shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.

(c) Claims to funding unaffected

Nothing in this chapter shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.

(d) Other authority to impose conditions on funding unaffected

Nothing in this chapter shall—

(1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a per-

son other than a government as a condition of receiving funding or other assistance; or

(2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this chapter.

(e) Governmental discretion in alleviating burdens on religious exercise

A government may avoid the preemptive force of any provision of this chapter by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

(f) Effect on other law

[omitted; applies only to cases where scope of statute's application is based on Commerce Clause]

(g) Broad construction

This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.

(h) No preemption or repeal

Nothing in this chapter shall be construed to preempt State law, or repeal Federal law, that is equally as protective of religious exercise as, or more protective of religious exercise than, this chapter.

(i) Severability

If any provision of this chapter or of an amendment

made by this chapter, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this chapter, the amendments made by this chapter, and the application of the provision to any other person or circumstance shall not be affected.

42 U.S.C. § 2000cc-4. Establishment Clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment to the Constitution prohibiting laws respecting an establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. In this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

42 U.S.C. § 2000cc-5. Definitions

In this chapter:

(1) Claimant

The term "claimant" means a person raising a claim or defense under this chapter.

(2) Demonstrates

The term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

(3) Free Exercise Clause

The term "Free Exercise Clause " means that portion of the First Amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) Government

The term "government"—

(A) means—

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 2000cc-2(b) and 2000cc-3 of this title, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) Land use regulation

[omitted]

(6) Program or activity

The term "program or activity" means all of the operations of any entity as described in paragraph (1) or (2) of section 2000d-4a of this title.

(7) Religious exercise

(A) In general

The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) Rule

[omitted; applies only to land-use cases]

Provisions Referred to or Incorporated into the Religious Land Use and Institutionalized Persons Act

Civil Rights of Institutionalized Persons Act

42 U.S.C. § 1997 (2006). Definitions

As used in this subchapter—

(1) The term "institution" means any facility or institution—

(A) which is owned, operated, or managed by, or provides services on behalf of any State or political subdivision of a State; and

(B) which is—

(i) for persons who are mentally ill, disabled, or retarded, or chronically ill or handicapped;

(ii) a jail, prison, or other correctional facility;

(iii) a pretrial detention facility;

(iv) for juveniles—

(I) held awaiting trial;

(II) residing in such facility or institution for purposes of receiving care or treatment; or

(III) residing for any State purpose in such facility or institution (other than a residential facility providing only elementary or secondary education that is not an institution in which reside juveniles who are adjudicated delinquent, in need of supervision, neglected, placed in State custody, mentally ill or disabled, mentally retarded, or chronically ill or handicapped); or

(v) providing skilled nursing, intermediate or long-term care, or custodial or residential care.

* * * *

Civil Rights Act of 1964, as amended

42 U.S.C. § 2000d-4a. "Program or activity" and "program" defined

For the purposes of this subchapter, the term "program or activity" and the term "program" mean all of the operations of—

(1) (A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or

local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2) (A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 7801 of Title 20), system of vocational education, or other school system;

(3) (A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

ADMINISTRATIVE DIRECTIVE 98-04

SUBJECT: Personal Cleanliness and Grooming for Inmates

NUMBER: 98-04

SUPERSEDES: 98-02

APPLICABILITY: All inmates under the care and custody of the Arkansas Department of Correction

REFERENCE: AR 840 – Personal Cleanliness and Grooming for Inmates

PAGE: 1 of 2

APPROVED: Original signed by Larry Norris

EFFECTIVE DATE: 4/20/98

I. POLICY:

To provide for the health and hygiene of incarcerated offenders, and to maintain a standard appearance throughout the period of incarceration, minimizing opportunities for disguise and for transport of contraband and weapons.

II. PROCEDURES:

A. All inmates, including current inmates, are expected to conform with the grooming policy. New inmates whose hair does

not meet standards will have their hair cut during the intake process prior to being photographed.

B. Inmates' hair must be worn loose, clean and neatly combed. No extreme styles are permitted, including but not limited to corn rows, braids, dread locks, mohawks, etc. The hair of male inmates must be cut so as to be above the ear, with sideburns no lower than the middle of the ear lobe and no longer in the back than the middle of the nape of the neck. Female inmates may wear their hair no longer than shoulder length.

C. No inmates are permitted to wear or possess hair pieces.

D. No inmates will be permitted to wear facial hair other than a neatly trimmed mustache that does not extend beyond the corner of the mouth or over the lip. Medical staff may prescribe that inmates with a diagnosed dermatological problem may wear facial hair no longer than one quarter of an inch. Inmates must present MSF 207 upon demand.

E. Nails on hands and feet will be clipped so as not to extend beyond the tips of fingers or toes.

F. Inmates will maintain standards of hygiene so as not to create a health hazard or public nuisance. If personal hygiene falls below these standards, the Chief of Security may order that the necessary steps be taken to force compliance. For mental health services and medical housing, this authority is vested in the staff person supervising the treatment area.

G. Failure to abide by grooming standards is grounds for disciplinary action.

H. Hygiene, but not grooming, standards, are applicable to individuals housed in jails operated by ADC. Grooming standards may be deemed applicable for individuals with escape histories or who have been known to smuggle weapons or contraband in their hair.

III. STANDARDS:

American Correctional Association; Standards For Adult Correctional Institutions, Third Edition, 3-4324.

ADMINISTRATIVE REGULATIONS
STATE OF ARKANSAS
BOARD OF CORRECTIONS

Section Number: DOC 840
DCP 7.17

Page Number: 1 of 1

Board Approval Date: 2/19/98

Supersedes:	**Dated:**
DOC 840	**11/30/79**
DCP 7.17	**04/29/94**

Reference: [Blank]

Effective Date: 4/20/98

SUBJECT: Personal Cleanliness and Grooming for Offenders

I. AUTHORITY:

The Board of Correction and Community Punishment is vested with the authority to promulgate Administrative Regulations by Ark. Code Ann. §§ 12-27-105, 16-93-1203 and 16-93-1205 (Michie Supp. 1995).

II. APPLICABILITY:

All offenders under the care and custody of the Arkansas Department of Correction and Department of Community Punishment (Departments).

III. POLICY:

To provide for the health and hygiene of offenders confined or incarcerated in Department facilities, and to maintain a standard appearance throughout the period of incarceration or confinement, minimizing opportunities for disguise and for transport of contraband and weapons.

IV. GUIDELINES:

A. Offenders shall be provided necessary items and services to maintain personal hygiene and grooming.

B. Grooming regulations to maintain a standard appearance shall be stated in an Administrative Directive.

V. STANDARDS:

American Correctional Association; Standards For Adult Correctional Institutions, Third Edition, 3-4324, and Standards for Adult Community Residential Services 3-ACRS-4D-10.

ADMINISTRATIVE DIRECTIVE

SUBJECT: Bathing and Personal Hygiene and Hair Care Services

NUMBER: 05-26

SUPERSEDES: [BLANK]

APPLICABILITY: Institutional Staff

REFERENCE: AR 840 – Personal Cleanliness and Grooming For Inmates

PAGE 1 of 1

APPROVED: Original signed by Larry Norris

EFFECTIVE DATE: 9/7/05

I. POLICY:

It shall be the policy of the Arkansas Department of Correction that all inmates be provided with adequate bathroom and barber facilities to enable them to maintain acceptable standards of personal hygiene. These facilities will include sufficient bathing facilities to permit inmates to shower at least three (3) times per week, temperature controls for shower units, and hair care services which comply with applicable health requirements.

II. PROCEDURES:

Housing areas in all units will provide showers, toilets, and hand washing sinks for the inmate population. Controls on the showers will not allow the water temperature to be above safe limits.

Personal hygiene items provided to the inmates include toothbrush, toothpaste, safety razor (as needed), and a pocket comb. Other personal hygiene items are available for purchase from the inmate commissary.

Hair care services will be available to all inmates.

RESPONDENT'S BRIEF

No. 13-6827

In The
Supreme Court of the United States

GREGORY HOUSTON HOLT
A/K/A ABDUL MAALIK MUHAMMAD,

Petitioner,

v.

RAY HOBBS, DIRECTOR, ARKANSAS
DEPARTMENT OF CORRECTION, ET AL.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit**

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether the Arkansas Department of Correction's grooming policy violates the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.*, to the extent that it prohibits petitioner from growing a one-half-inch beard in accordance with his religious beliefs.

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INTRODUCTION

On January 20, 2012, Latavious Johnson, who was already serving time in an Arkansas prison for first-degree murder, killed a correctional officer named Barbara Ester by stabbing her with an improvised metal knife or "shank."[1] Murders and other violent crimes in prisons have not been unusual in our nation's history. After all, "[p]risons, by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for antisocial criminal, and often violent conduct," and inmates are typically incarcerated precisely because they have "shown a lapse in ability to control and conform their behavior to the legitimate standards of society by the normal impulses of self-restraint. " *Hudson v. Palmer*, 468 U.S. 517, 526 (1984) (discussing published statistics regarding instances in which prison personnel have been murdered, inmates have killed other inmates, and riots have erupted).

Petitioner, who describes himself as a Yemen-trained Muslim fundamentalist, is no exception to the violent nature of the inmates housed in Arkansas's maximum-security prisons. In January 2005, for example, he was indicted by a federal grand jury for threatening to kidnap and harm the two daughters of

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[1] *See* Nick Valencia, CNN (Jan. 20, 2012), *Inmate Fatally Stabs Guard in Arkansas*, *available at* http://www.cnn.com/2012/01/20/justice/arkansas-prison-guard-killed/.

President George W. Bush.[2] A few years after pleading guilty to those charges, he broke into the home of his ex-girlfriend, slit her throat, and stabbed her chest, reminding her that he could break in "anytime [he] wanted to" and that nobody else could "have" his victim if Petitioner could not. *Holt v. State*, 384 S.W.3d 498, 502 (Ark. 2011). Prior to his trial, Petitioner advised Randy Morgan, Chief of Detention at the Pulaski County Detention Facility, that should his trial "go south," he intended to "wage jihad against any court personnel, detectives, [and] adverse witnesses. " *Id.* at 505. He warned that he would "do whatever it takes to get these individuals, as Allah is my witness." *Id.* Petitioner told Chief Morgan that his attention to the matter "could save lives." *Id.* Petitioner also wrote Detective Damon Whitener at the Little Rock Police Department – whom Petitioner addressed as a "kafir pig" – and asked that Allah grant him the highest level of paradise "should [he] die waging jihad in this case." *Id.* at 505-06.

Petitioner's threats were not merely isolated statements made in the heat of the moment. After arriving at the Arkansas Department of Correction (ADC) for the purpose of serving his life sentence, for example, Petitioner made similar threats of jihad against public officials in Iowa. He was also caught holding a knife against a fellow inmate's throat following a religious dispute.

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[2] *United States v. Holt*, No. 2:05-cr-20012-PM-APW, DE 1 (W.D. La. Jan. 12, 2005).

The real-life stories of inmates such as Latavious Johnson and Petitioner offer powerful glimpses into prison life in a way that bland statistics regarding prison violence, such as those discussed in *Hudson*, cannot. But the point made by those stories and statistics is obvious: Prisons are dangerous places. Correctional officers regularly work within the striking distance of inmates who may decide to injure or kill the moment an opportunity avails itself. Prison officials create rules intended to strike a delicate balance between safety and security, on the one hand, and giving inmates a sense of dignity and achieving rehabilitative goals, on the other hand; inmates spend countless hours plotting ingenious measures designed to circumvent prison rules so as to achieve violent or criminal ends; and prison officials respond with a broader set of prophylactic countermeasures, altering the original balance.

When it comes to making prison policies, the stakes are high; lives can be lost if the wrong decision is made. ADC takes religious freedom seriously, but it takes seriously its paramount interests in safety and security, too. It is against this backdrop that this Court has consistently taken a pragmatic, deferential approach in defining what it means to enjoy a *constitutional* right to freely exercise one's religion within the confines of prison walls. *See, e.g.*, *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348-49 (1987) (noting that "lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations

underlying our penal system" and that "the appropriate balance" of the relevant factors requires courts to give "appropriate deference" to prison officials "who are actually charged with and trained in the running of the particular institution under examination") (quotations and citations omitted).

This case, of course, involves a Muslim inmate's claim that he has a statutory right to maintain a half-inch beard under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq.*, even though such beards are prohibited by ADC's grooming policy. But, because this is the Court's first opportunity to apply RLUIPA, other questions lurk in the background. Lawsuits and grievances regarding religious accommodations under RLUIPA are made by hundreds of ADC inmates every year, and they are made by thousands of other prisoners across the country. This Court now has an opportunity to establish the legal framework by which such claims are decided. Questions that lower courts will decide under the framework the Court establishes in this case may include the following:

- Must a violent offender who has not been caught hiding contraband or harming others within the prison be afforded the right to possess metal bells and wands (which could be ground into shanks or modified into weapons, notwithstanding the absence of studies to prove the point) for use in Wiccan rituals? *Levie v. Ward*, No. 05-1419, 2007 WL 2840388 (W.D. Okla. Sept. 27, 2007).

- Should an inmate be allowed to fulfill his religious obligation to perform yoga next to a cellmate outside of recreation time, absent an individualized feasibility study regarding the potential expenses associated with assigning a correctional officer to monitor the particular yoga practitioner, who has placed himself in a vulnerable position?[3]

- To what extent must prison officials allow Sikh inmates to possess kirpans, which are functional knives that Sikhs are required by their religion to carry, based only on prison officials' suspicions and predictive judgments (rather than real-life examples or empirical studies) that kirpans are dangerous – even if they have dull edges and are sewn to the sheath. *Cheema v. Thompson*, 67 F.3d 883 (9th Cir. 1995) (affirming an injunction requiring a school district to afford Sikh students the right to have kirpans during the school day under RFRA, despite the school district's safety concerns).

- Must prisons allow Tulukeesh inmates to comply with their religious duty to spar with other inmates, or does RLUIPA respect a prison official's view

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[3] This example is adapted from the claims that an inmate has asserted in *Bargo v. Kelley*, No. 5:14CV00078, DE 2 (E.D. Ark. Feb. 27, 2014).

> that sparring poses "security implications" that are "obvious." *Jova v. Smith*, 582 F.3d 410, 416 (2d Cir. 2009).

There are, of course, numerous other scenarios that lower courts will evaluate based on this Court's opinion here. For example, there are countless cases involving dreadlocks and other long-hair styles, which have been used to smuggle contraband in the past but which the Federal Bureau of Prisons and several state prison systems find to present an acceptable level of risk. If there have been only a couple of documented dreadlock-related incidents in the last few years and the Federal Bureau of Prisons and most state prison systems allow them, is a reluctant state legally obligated to experiment with a much more relaxed policy and hope for the best? What if no multivariate regression study bears out the prison's fears? What if no such statistical study is even possible, under the rigorous standards of social science, given the absence of complete data on the origins of contraband and the means by which it is smuggled into the prison? And, at what point are administrative and cost considerations of this legal regime relevant? *See* Taylor G. Stout, Note, *The Costs of Religious Accommodation in Prisons*, 96 Va. L. Rev. 1201, 1202 (2010) (concluding that RLUIPA imposes significant costs on prisons and that "[t]hese burdens are more onerous than Congress intended when passing the statute and more severe than federal courts initially appreciated").

However federal courts answer these questions in due course, this much is clear: Congress did not intend for RLUIPA to usher in the sort of sweeping changes that Petitioner envisions. Context matters in the application of RLUIPA's compelling-interest standard. The statute must be applied with sensitivity to prison officials' paramount security concerns and federal courts' longstanding practice of giving deference to those officials. *See Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005). Like items that can be modified into weapons, the prison officials in this case determined that beards (including half-inch beards) give rise to unacceptable risks. The courts below properly declined to override the judgments of those highly experienced prison administrators, and this Court should affirm.

STATEMENT

I. Factual Background

A. ADC's Grooming Policy

A seven-member Board of Correction promulgates ADC's prison regulations.[4] Policies are initially developed by a committee and then taken to the Board for final approval. ADC's Director typically

[4] *See* http://adc.arkansas.gov/about/Pages/BoardofCorrection.aspx.

issues more detailed regulations, called administrative directives, to further the Board's policies.

In 1997, the Board asked ADC's Director at the time, Larry Norris, to review the grooming practices of inmates housed inside ADC and to help create a policy that would serve four important goals: (1) provide for the health and hygiene of incarcerated offenders; (2) maintain a standard appearance throughout the period of incarceration; (3) minimize opportunities for disguise; and (4) minimize opportunities for the transport of contraband and weapons. In furtherance of those goals, Director Norris had his staff prepare a memorandum detailing the grooming policies of at least five other states and the Federal Bureau of Prisons to determine what policies other prison systems were utilizing and whether or not their policies would work in Arkansas.[5]

After considering the policies of a number of other prison systems, the Board decided that a no-beard policy would work best for Arkansas in achieving the four goals. In April 1998, Director Norris issued Administrative Directive 98-04 ("AD 98-04"), which set forth a new grooming policy for all Arkansas prisons. The policy states, in part, as follows:

> No inmates will be permitted to wear facial hair other than a neatly trimmed mustache

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[5] The background of ADC's development of the grooming policy at issue in this case is set forth in *Fegans v. Norris*, 537 F.3d 897 (8th Cir. 2008).

> that does not extend beyond the corner of the mouth or over the lip. Medical staff may prescribe that inmates with a diagnosed dermatological problem may wear facial hair no longer than one quarter of an inch. Inmates must present MSF 207 upon demand.

B. Petitioner's Incarceration at ADC

In June 2010, Petitioner was convicted, as a habitual offender, of aggravated residential burglary and first-degree domestic battering. He received a sentence of life imprisonment on the aggravated residential burglary charge and a sentence of forty years on the first-degree domestic battering charge, both of which stemmed from Petitioner stabbing a former girlfriend several times in the neck and chest. *Holt*, 384 S.W.3d at 502.

Petitioner was transferred into ADC's Diagnostic Unit for orientation in mid-July 2010.[6] Upon arriving at ADC, Petitioner was given an order to shave his beard in compliance with ADC's grooming policy so that he could be photographed clean-shaven as a new commitment. He refused. Over the next several weeks, Petitioner repeatedly refused to comply with the grooming policy, preventing a clean-shaven photograph of Petitioner from being taken.

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[6] *See* http://adc.arkansas.gov/inmate_info/search.

A year later, Petitioner submitted a Request for Interview form to Deputy Warden Mark Warner, seeking a religious exemption to ADC's grooming policy. Respondent Gaylon Lay, the warden of the Cummins Unit (where Petitioner was then housed), denied the request. Petitioner then informed Lay that he only answers to Shari'a law and only swears allegiance to an Islamic government or caliphate run by the Shaykhs. Petitioner further stated that when the kafir's rules run into conflict with the laws of Allah, he is duty bound to disobey the kafir.

Petitioner soon submitted another Request for Interview. This time, he informed prison staff of a "blood feud" based on Shari'a law that existed between himself and inmate Abdulhalum Muhammad. Petitioner informed staff that no amount of separation would stop them from achieving their goals of violence and that, in the name of safety, inmate Muhammad should never be transferred to the Cummins Unit where Petitioner resided. In response to the notification, inmate Muhammad was placed on Petitioner's enemy alert list.

A few months later, Petitioner wrote a letter to police officials in Ottumwa, Iowa, and gave them a stern warning: "The purpose of this letter is to inform you that, inshallah, I intend to wage harb in your town as a result of the mother of my child having fled there years ago and not letting me see the baby." Def.'s Resp. to P.'s Mot. for Order of Release, *Holt v. Hobbs*, No. 5:11CV00164, DE 84-1 (E.D. Ark. Feb. 3, 2012) (Notice of Discriplinary Violation). Petitioner

proclaimed that he intended to "take things to another level" by calling upon his "Muslim contacts all over the U.S. that will assist a brother in need." *Id.* Petitioner was disciplined for writing threats of bodily harm or death to the Ottumwa Police Department.

Petitioner eventually submitted to ADC's grooming policy and allowed his beard to be shaved for a while. Then he grew it back. And then he sought (and temporarily won) a pre-hearing preliminary injunction requiring ADC to allow Petitioner to maintain a half-inch beard. After his trim on December 13, 2011, Petitioner wrote to the unit deputy warden, declaring that "a state of war" existed between Petitioner and the inmate barber because, in Petitioner's opinion, his beard was cut shorter than one-half-inch. Petitioner further stated that the inmate barber "*cannot* cross my path again." Given Petitioner's prior behavior, ADC officials took Petitioner's words as a serious threat, and they permanently separated Petitioner from the inmate barber. J.A. 83.

In April 2012, Petitioner was discovered holding a knife to the neck of his cellmate, Andrew Dennison, and demanding to see the lieutenant on duty. Def.'s Resp. to P.'s Mot. for Review, *Holt v. Hobbs*, No. 5:11CV00164, DE 109-1 (E.D. Ark. July 5, 2012). Petitioner threatened to kill Dennison if his demands were not met. In the aftermath of the incident, Petitioner did not deny his actions. He stated he acted out against Dennison when the infidel sat down on the floor inside a hand-drawn diagram, which offended Petitioner's religious beliefs. Petitioner was found

guilty of violating ADC's rules of discipline. As a result of the incident, Petitioner and inmate Dennison were placed on the appropriate enemy alert lists.

II. The Proceedings Below

A. Commencement of the Action

Petitioner sued ADC in June 2011, alleging that the agency's grooming policy violated his constitutional and statutory rights to freely exercise his religion. J.A. 16. Like the plaintiff in *Fegans*, Petitioner contended that his religion prohibits him from shaving altogether. J.A. 54, 55, 58. But compliance with his religious duty to grow an uncut beard was admittedly not an option; Petitioner conceded that, at some point, beards present a security threat. J.A. 139 ("I am not arguing that having unrestricted hair, unrestricted beard does not present a security threat, because it does."). He argued, however, that the security threat is inversely related to the length of the facial hair; with a half-inch beard, for example, "[y]ou can't even barely hide a razorblade in it." J.A. 70.[7]

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[7] Petitioner has never identified the point at which a beard presents a security threat, arguing only that ADC's no-beard policy is overly cautious; at a minimum, the agency should allow half-inch beards as a compromise. The next cases, of course, will concern the potential accommodation of a ¾-inch beard, and a one-inch beard, and so on. "A judge would be unimaginative indeed if he could not come up with something a little less

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Along with his complaint, Petitioner filed a motion for a preliminary injunction, seeking an order (1) prohibiting Warden Gaylon Lay and ADC Director Ray Hobbs from enforcing ADC's grooming policy so as to allow Petitioner to grow a half-inch beard, and (2) requiring Respondents to cease disciplinary efforts against inmates who have grown (or may grow) half-inch beards. P.'s Mot. for Prelim. Inj., *Holt v. Hobbs,* No. 5:11CV00164, DE 3 (E.D. Ark. June 28, 2011). Petitioner asked the district court to enjoin Respondents without affording them an opportunity to learn of Petitioner's filings.

On October 18, 2011, the district court granted Petitioner's motion, temporarily enjoining ADC from forcing Petitioner to trim his beard shorter than one-half-inch in length. J.A. 179. Almost a month later, Respondents first learned about the case after being served with the summons and complaint. The District Judge ordered the Magistrate Judge to hold an individualized evidentiary hearing, reminding the Magistrate Judge that RLUIPA places the burden on Respondents to show that any burden on Petitioner's religious exercise is the "least restrictive means of achieving the security goals sought by the policy." J.A. 35.

'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down." *Illinois State Bd. of Elec. v. Socialist Workers Party,* 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring) (cautioning against using the least restrictive means test in a way that gives rise to a "slippery slope" of uncertainty).

B. Preliminary Injunction Hearing

The Magistrate Judge convened an evidentiary hearing six weeks later. J.A. 48. Respondent Lay – the Warden of the Cummins Unit and a 36-year veteran of ADC – testified regarding his identification-related concerns with allowing Petitioner to have a half-inch beard. J.A. 79. Lay testified that an inmate can quickly alter his appearance if he is allowed to grow even a half-inch beard, such as by shaving his beard immediately upon escape. *Id.*

Lay also testified about his contraband-related concerns with beards. He testified as to his knowledge of inmates hiding contraband on their person, including small items such as homemade darts, bits of razor, and other weapons that can fit in an inmate's half-inch beard. J.A. 80. ADC officials have also testified that contraband can be hidden inside the mouth, and that an alteration to the appearance of the face caused by such contraband (such as a subtle bulge in the cheek) would be masked by facial hair. *Jones v. Meinzer*, No. 5:12CV00117, 2013 WL 5676886, *6 (E.D. Ark. Aug. 30, 2013).

While contraband has been a problem in the past, Lay observed that the population of inmates entering ADC is younger and more violent than ever before, which creates even greater security problems than in previous years. J.A. 86. He testified that there are numerous difficulties in attempting to

monitor 15,000 inmates within ADC; affording them one more place to hide weapons or contraband would not further the interests of security and safety for either employees or inmates. J.A. 80.

Lay also testified about administrative concerns with allowing inmates to have half-inch beards. As an example, he testified about a specific incident involving Petitioner after the district court temporarily enjoined ADC from enforcing the grooming policy against him. As discussed above, Petitioner accused an inmate barber of cutting Petitioner's beard too short, prompting Petitioner to declare "war" against the barber. J.A. 71, 82. For the safety of the inmate barber, prison officials separated the barber from Petitioner. J.A. 83. This type of incident can create administrative problems for ADC because the agency cannot change barbers every time a particular inmate disagrees with the length or style of his beard. *Id.* Lay also expressed his concerns about how to determine the exact length of an inmate's beard in such a way to avoid confrontations in the future and avoid administrative burdens on an already overworked staff. J.A. 80, 83-84.

Lay discussed his understanding of other state prison facilities, including their housing units. He testified that the majority of prison facilities in other states have cellblock units, where inmates are housed in one- or two-person cells. J.A. 101. This separation of inmates can help to reduce the flow of contraband from inmate to inmate, as they have less physical access to one another. In contrast, the Cummins Unit

and most other units within ADC have open barracks, with each barrack holding up to 50 inmates in the same room without partitions. J.A. 101. The structure of ADC's housing allows inmates greater access to one another, which can be positive for rehabilitative purposes. On the downside, open-barrack housing allows for greater opportunities to exchange contraband and use weapons on other inmates. Petitioner did not attempt to refute Lay's testimony on this topic or offer contrary evidence.

Lay was not aware of many other state facilities operating agricultural programs comparable to ADC. J.A. 101. Nor did Petitioner bring any such facilities to the attention of the Magistrate Judge. At the Cummins Unit, many maximum-security inmates perform agriculture work outside the prison's fence. *Id.* As of 2013, ADC utilized 26,665 acres for farming.[8] Inmates who work outside the prison fence attempt to smuggle weapons, drugs, and other contraband left in the fields back into the prison. J.A. 101. Allowing inmates to maintain beards covering the skin on the face would provide inmates who work outside the fence with a quick hiding place for contraband to be transported past the guards and inside the fence. Once inside the fence, the contraband could be picked

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[8] *See* Arkansas Department of Correction, 2013 Annual Report, *available at* http://adc.arkansas.gov/resources/Documents/2013annualReport.pdf.

up by another inmate, concealed, and used on staff members or other inmates.[9]

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[9] Petitioner contends (Pet. Br. 30 & n.9) that farming operations are common among state prison systems. But while other states may assign jobs outside of their security fences, the classification status of those inmates is often distinguishable from the inmates working the farms in Arkansas. The five prison systems cited by Petitioner, for example, make farm jobs available only to well-behaved, low-security inmates, while ADC assigns farm jobs to class IV inmates (the least desirable classification) and to nearly all newly incarcerated inmates for their initial work assignment. *See* Mississippi Department of Corrections, *Agricultural Enterprises*, http://www.mdoc.state.ms.us/agricultural_enterprises.htm ("Minimum and medium custody inmates are given the opportunity to participate in the Agricultural Enterprises program."); Oklahoma Department of Corrections, *James Crabtree Correctional Center*, http://www.ok.gov/doc/Organization/Field_Operations/West_Institutions/James_Crabtree_Correctional_Center.html (stating that minimum-security inmates support facility maintenance and farm programs); Ohio Department of Rehabilitation and Correction, *Inmate Security Classification Levels 1 Through 4*, http://www.drc.ohio.gov/web/drc_policies/documents/53-CLS-01.pdf at 2, 7 ("Level 1 inmates [who have the lowest security threat level] . may work outside of the fence," but those assignments must "be approved by the Managing Officer/designee following a detailed review of the inmate's records and an interview between the staff member making the recommendation and the inmate."); California Department of Corrections and Rehabilitation *Department Operations Manual*, http://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/DOM/dom%202014/2014%20DOM.pdf at 352, 353 (limiting or exempting "industry" participation, including farming, for inmates with certain convictions or sentences and exempting maximum-security inmates); North Carolina Department of Public Safety, *Dan Riven Prison Work Farm*, https://www.ncdps.gov/index2.cfm?a=000003,002240,002371,002384,

(Continued on following page)

ADC's Assistant Director of Institutions, Grant Harris, also testified on behalf of Respondents. Harris began his career with ADC in 1979 and worked his way up through the security ranks. J.A. 113. Harris's three decades of experience in corrections includes time as an entry-level correctional officer, 18 years as a warden, and numerous positions in between. J.A. 113, 127-28.

Harris testified about a particular problem involving contraband that ADC has encountered in recent years – namely, the introduction of cellular phones into prisons. In 2011, ADC confiscated in excess of 1,000 cellular phones from inmates. J.A. 114. Cellular phones are the primary covert means by which inmates communicate with the outside world, including for illicit purposes such as running criminal enterprises and arranging for the delivery of contraband. Cellular communications cannot be detected by ADC's call-monitoring equipment.

Harris showed the Court a cellular phone's subscriber identity module (SIM card) that had been confiscated from a facility. Tr. Ex. No. 2; J.A. 116, 128-29. The SIM card is the piece of the phone that contains network identification and other information vital for the operation of a cellular phone. The Magistrate Judge examined the SIM card and noted its 3/8" x 3/8" dimensions. J.A. 128. Harris testified that a

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002289 (stating that minimum-security inmates work at various state facilities).

SIM card can easily be hidden inside a one-half-inch beard, thus severely compromising ADC's efforts to prevent the flow of contraband into, and within, prisons. J.A. 116. The Magistrate Judge was "impressed" by this testimony. J.A. 155.

Harris was also concerned about the possibility of correctional officers having to perform hands-on inspections of facial hair to search for contraband and weapons. Razorblades, dirty needles, or other items could cut correctional officers. J.A. 130.

Petitioner also testified at the hearing. He said that his interpretation of the Islamic faith requires him to maintain an uncut beard. J.A. 18, 54. Because, however, he found a case from a district court within the Ninth Circuit in which Muslim inmates were allowed by the court to maintain half-inch beards,[10] he asked ADC to allow him to maintain a beard of a similar size. J.A. 56. He conceded that Respondents have compelling interests in maintaining safety and security within the institution and that an uncut beard would jeopardize those interests. J.A. 18, 57. He also testified that not all Muslims believe a man must maintain a beard. J.A. 58. Finally, he acknowledged that ADC permits him to honor his religion in a variety of other ways, such as by using a prayer rug during his worship times, reading and studying the Koran, communicating with a religious advisor,

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[10] *Mayweathers v. Terhune*, 328 F. Supp. 2d 1086 (E.D. Cal. 2004).

maintaining the required diet, and observing religious holidays. J.A. 60-62.

Petitioner cross-examined Lay and Harris regarding alternative ways to administer a prison that Petitioner believed would allow him to maintain a beard while addressing ADC's concerns. Lay and Harris explained why Petitioner's proffered options were unworkable, and they provided support for their opinions. They explained, for example, why quarter-inch beards, which some inmates with diagnosed dermatological conditions are allowed to maintain, are different from half-inch beards. J.A. 75 (testifying that quarter-inch beards are so short that officers can see the skin and, therefore, such beards do not present the same security and administrative concerns as half-inch beards).

Petitioner did not offer any testimony other than his own. Nor did he offer any documentary evidence at the hearing.

In addition to receiving the testimony of Petitioner, Lay, and Harris, the Magistrate Judge studied the testimony and evidence submitted in *Fegans*, a prior challenge to ADC's grooming policy under RLUIPA. During the bench trial in *Fegans*, Director Norris testified that ADC's prohibition on inmate facial hair helped prevent inmates from changing their appearances and made it easier for law enforcement officers to track and identify inmates following escapes. J.A. 168.

C. Lower Court Decisions

The Magistrate Judge issued a written recommendation in favor of ADC. He began his written analysis by revisiting the testimony: "According to Warden Lay, a one-half-inch beard can conceal razor blades, drugs and homemade darts." J.A. 166. Such a beard can also allow an inmate to change his appearance during an escape. *Id.* The "most compelling testimony," according to the Magistrate Judge, came from Harris, who testified that inmates could conceal syringe needles in their beards, which can potentially wound an officer charged with inspecting the beard. J.A. 167. The Magistrate Judge also highlighted Harris's testimony that cellular phones have become an "emerging threat" to prison security; inmates try to circumvent the phone system though such devices. *Id.* A SIM card, which the Magistrate Judge measured to be only 3/8" x 3/8", is the "critical piece" of a cellular phone. *Id.*

The Magistrate Judge evaluated Petitioner's First Amendment claim under the *O'Lone* standard and concluded that it failed. J.A. 172. He then turned to the RLUIPA claim, noting that Congress added "additional protection" for prisoners and that the statute uses a "compelling interest standard." J.A. 173. But the Magistrate Judge found that deference to prison officials is still relevant to the analysis under *Cutter*, and he recommended that the district court deny the motion for a preliminary injunction and dismiss the case. J.A. 173, 175, 177.

The District Judge "carefully" considered the evidentiary record and adopted the Magistrate Judge's recommendations. J.A. 179. On appeal, the Eighth Circuit affirmed. The court of appeals found that Respondents established that ADC's grooming policy "was the least restrictive means of furthering a compelling penological interest." J.A. 186. The practices of prisons in other jurisdictions, the court noted, are relevant to the feasibility analysis; but deference to prison officials is still required under RLUIPA. Given the totality of the evidence, Respondents "met their burden" in this case. J.A. 186-87.

SUMMARY OF ARGUMENT

I. Courts have historically given substantial deference to prison officials in evaluating the legality of prison rules. Congress did not want to overturn that tradition when it enacted the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1 *et seq.*, or RLUIPA.

A. There are good reasons why courts have long deferred to prison officials. First, deference leads to better decisions because, compared to prison officials, judges lack the training and experience necessary to understand the nature of a specific safety risk or the administrative and logistical reasons for responding to a security concern in a particular way. Second, the operation of prisons is peculiarly within the province

of the other branches of government, and it implicates core concerns of sovereign states.

B. RLUIPA was largely modeled after RFRA. The lawmakers who supported RFRA did not want courts to cease giving deference to prison officials. They expected that courts would "continue" their "tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with considerations of costs and limited resources." *See* S. Rep. No. 111, 103rd Congress, 1st Sess. (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1898-1901.

C. After this Court held that RFRA was unconstitutional as applied to the states, Congress responded by enacting RLUIPA. As with RFRA, Congress anticipated that courts would continue to give deference to prison officials. *Cutter*, 544 U.S. at 723. RLUIPA must be applied "in an appropriately balanced way" and "with particular sensitivity to security concerns." *Id.* at 710. RLUIPA's legislative history and the constitutional avoidance canon support the view that the statute must not be interpreted "to elevate accommodations of religious observances over an institution's need to maintain order and safety." *Id.* at 722. Reviewing courts must, instead, "apply the Act's standard with due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and

discipline, consistent with consideration of costs and limited resources." *Id.* at 723 (internal quotation marks omitted) (quoting 146 Cong. Rec. S7774, S7775 (daily ed. June 27, 2000) (joint statement of Sens. Hatch and Kennedy on RLUIPA)).

The concept of deference within a framework of strict scrutiny means that courts should place substantial weight on the testimony of experienced prison officials when evaluating the entire constellation of evidence. Operationalizing deference means at least four things. *First*, prisons must devise prophylactic rules *before* an escape or violent incident occurs, and so courts should not insist on data, studies, or concrete examples before according deference. *Second*, courts should respect the fact that running a prison involves complicated tradeoffs between competing interests, and prison officials may properly choose to make non-religious exemptions or regulate only part of a problem. *Third*, prison administrators must devise rules that are suitable to their particular prison environments, and the law does not compel them to accept the heightened risks that other jurisdictions have chosen to accept. *Fourth*, courts should not invent administrative requirements that are untethered to RLUIPA's text, such as by requiring an administrative record that facilitates APA-like judicial review.

II.A. ADC's no-beard policy furthers its compelling interests in safety and security. The Court has repeatedly held that prison safety and security are compelling interests. And Petitioner agrees that

policies in furtherance of those goals, such as "staunching the flow of contraband," are lawful policy objectives. J.A. 18.

B. ADC's grooming policy serves two interests that implicate safety and security. First, an inmate could easily hide contraband within a beard. Similarly, a beard could help an inmate secret contraband in his mouth by concealing the contours of the face. Second, ADC's no-beard policy furthers its interests in the rapid identification of inmates and avoiding confusion. Inmates have been known to shave their beards for the purpose of escaping, gaining access to restricted areas, or harming others. The no-beard policy minimizes an inmate's ability to alter his appearance quickly and significantly.

C. The grooming policy has a narrow exception for prisoners who require quarter-inch beards for diagnosed medical conditions. But that does not mean that ADC's reasons for not allowing other prisoners to have longer beards are unworthy of credence. After all, laws and regulations often reflect competing interests. There are *quantitative* differences between the quarter-inch beards permitted under the current policy and the half-inch beards that would be permitted under the more liberal policy that Petitioner wants: ADC officials have described quarter-inch beards as "rare" and often "temporary" in nature. There are also *qualitative* differences: quarter-inch beards are so short that they usually allow correctional officers to see the skin. That means that quarter-inch beards entail reduced contraband and identification-related concerns.

It also means that the administrative problem of monitoring compliance is not so great because a correctional officer can readily determine, by visual inspection, whether the skin can be seen and whether the beard has grown to the point of noncompliance.

III.A. ADC's grooming policy is the least restrictive means of furthering its governmental interests. Other alternatives are not equally effective, and so they do not qualify as less restrictive means.

A.1. A policy allowing for half-inch beards would still give rise to contraband problems because small objects, such as bits of razor and SIM cards, can fit inside a half-inch beard. In addition, half-inch beards hide the skin and, therefore, conceal the contours of the face, making it easier for inmates to hide contraband in their mouths. Correctional officers would also face safety risks in conducting hands-on searches of prisoners' half-inch beards. Allowing prisoners to search themselves, in contrast, would be problematic since inmates can manipulate the self-search. Nor is putting everyone who has a half-inch beard in permanent administrative segregation a viable solution; such a policy poses significant constitutional concerns.

A.2. The identification-related concerns associated with beards would not be solved by limiting beard lengths to half an inch. A half-inch beard would still allow opportunities for disguise, trickery, and confusion. The "dual photograph" option would not help correctional officers locate quickly an inmate

who has momentarily altered his appearance in prison, because the correctional officers would be forced to turn to photographic records rather than relying on their own recognition of an inmate's appearance. Sometimes, an initial clean-shaven photograph is not even available. Petitioner, for example, refused to allow such a photograph. Finally, serial rephotography would create disciplinary and administrative problems. For example, inmates might not cooperate with the taking of additional photographs, and inmates might game the system by shaving before their photographs with a beard can be taken. Saying that a prison will keep up with significant changes in inmates' appearances in a written policy is one thing; having an overtaxed staff fully implement such a policy is something else altogether.

A.3. A policy that allows half-inch beards would also create administrative problems. Measuring half-inch beards for compliance throughout an entire prison system would entail substantial administrative burdens. Increased hands-on searches would be time-consuming and risky. And disagreements between inmates and staff would erupt inevitably.

A.4. The fact that other prison systems allow some inmates (but perhaps not Petitioner, due to his violent past, maximum-security status, previous possession of a shank, and declaration of war against an inmate barber) to wear a half-inch beard does not mean that ADC's grooming policy violates RLUIPA. There is no evidence that other jurisdictions have had positive experiences with their more liberal policies.

Nor is there a publication or record evidence explaining why other jurisdictions have chosen to be more lax than Arkansas and other states; litigation, rather than the comparative efficacy of prison policies, may have something to do with it. As best as we can tell, other jurisdictions are simply more willing to tolerate greater risks and costs. RLUIPA does not require Arkansas to incur those same risks and costs just because other states have.

B. A policy of allowing half-inch beards for all prisoners who claim a religious need to have a beard is not a viable less restrictive alternative. Granting religious-based exceptions to ADC's grooming policy would undermine the very purpose of the policy. A grooming policy that makes religious-based exceptions for half-inch beards, just like a policy that allows half-inch beards for everyone, would entail the same contraband and identification concerns discussed above. Arkansas has a significant population of Muslim inmates, and adherents to other faiths would avail themselves of a religious-based exception, too. The fact that a particular maximum-security inmate has not yet smuggled contraband or tried to escape says little about the probability of such things in the future.

To the extent that Petitioner contends that Respondents should ignore other religious objectors and focus only on him, his argument is even weaker due to his pre- and post-incarceration history of violence, threats, and disputes. Prison officials at

ADC are appropriately concerned about the possibility of allowing Petitioner to wear a half-inch beard.

ARGUMENT

I. Courts should give deference to prison officials under RLUIPA.

Federal courts have historically accorded great deference to prison administrators in determining the constitutionality of prison rules. This Court has held, for example, that prison administrators "should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 548 (1979) (citations omitted). There are weighty practical, institutional, and jurisprudential reasons why the Court has always insisted on giving deference to prison officials in First Amendment cases and why Congress wanted that tradition to continue in cases brought under RFRA and RLUIPA.

A. There are strong reasons why the Court has always given deference to prison officials in First Amendment cases.

Judicial deference to prison officials leads to better decisions because judges are often ill-suited to appreciate the magnitude of a particular security risk

or the need for a unique solution to a certain problem. While courts should not abdicate their responsibility to protect inmates' free-exercise rights, judgments regarding prison security are "peculiarly within the province and professional expertise of corrections officials." *Pell v. Procunier*, 417 U.S. 817, 827 (1974). Prison officials, unlike judges, are "actually charged with and trained in the running of the particular institution under examination." *Bell*, 441 U.S. at 562. Their charge carries a heavy responsibility. And their training instills due caution. Prisoners can be very creative in concocting plans for violence or escape. In the calm serenity of judicial chambers, a court might find it almost preposterous to think that an inmate might conceal a sharp blade or glass shards in a body cavity; prison officials know better. *Florence v. Bd. of Chosen Freeholders of Co. of Burlington*, 132 S. Ct. 1510, 1519 (2012) (discussing instances in which sharp blades and knives have been concealed in bodily orifices).

Judicial deference to prison officials is not merely a practical tool for reaching correct decisions; it has constitutional dimensions, implicating both separation-of-powers and federalism concerns. With regard to the separation of powers, the Court has noted that "judicial deference is accorded not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of

our Government, not the Judicial." *Bell*, 441 U.S. at 548 (citation omitted). And from a federalism perspective, it is "difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." *Woodford v. Ngo*, 548 U.S. 81, 94 (2006) (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973)). Given this backdrop, courts are justified in assuming that, in enacting RFRA and RLUIPA, Congress "intended to modify, but not trample upon, states' traditional prerogatives in this area." *Lovelace v. Lee*, 472 F.3d 174, 217 (4th Cir. 2006) (Wilkinson, J., concurring in part and dissenting in part) (citing *Gregory v. Ashcroft*, 501 U.S. 452, 457-61 (1991)).

B. Courts must give prison officials deference under RFRA.

Applying the teachings of *Bell* to prisoners' claims under the Free Exercise Clause, lower courts often used a balancing test that weighed a prisoner's constitutional interests against the prison system's legitimate governmental interests in operating its prisons. In a Sixth Circuit case endorsed by the Senate Report on RFRA, for example, the court of appeals held that courts should defer to the expert judgment of prison officials in determining the necessity of a particular restriction while also considering other factors. *Weaver v. Jago*, 675 F.2d 116, 118-119 (6th Cir. 1982), *cited in* S. Rep. No. 111, 103rd Congress, 1st Sess. (1993), *reprinted in* 1993

U.S.C.C.A.N. 1892, 1899. The interests asserted by the prison must be "of the highest order," and its officials must "do more than simply offer conclusory statements that a limitation on religious freedom is required for security, health, or safety." *Id.* at 119 (citation omitted). The prison officials in *Weaver* gave no explanation for why the prison was concerned about long hair beyond stating, in a conclusory affidavit, that the grooming policy was necessary for security, hygiene, and safety. Therefore, the Sixth Circuit remanded for additional proceedings that would allow for greater factual development.

This Court eventually held that prisoners' rights under the Free Exercise Clause are governed by a reasonableness test, *see O'Lone*, 482 U.S. 342, and that the First Amendment does not shield religious practitioners from the burdens of generally applicable laws, *see Employment Division, Dep't of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990). In 1993, Congress "largely repudiated" *Smith* by enacting RFRA. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___ (2014), slip op. at 4. But there is no indication that, in enacting RFRA, Congress intended to overturn courts' historical deference to prison officials. *See* S. Rep. No. 111, 103rd Congress, 1st Sess. (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1898-1901 (anticipating that courts would "continue" their "tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with considerations of costs and limited

resources"). In fact, just two years later, Congress enacted the Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e *et seq.*, for the very purpose of eliminating "unwarranted federal-court interference with the administration of prisons." *Woodford*, 548 U.S. at 93 (footnote omitted). The intent of RFRA, then, was "to restore traditional protection afforded to prisoners' claims [under the pre-*O'Lone* balancing test used in cases such as *Weaver*], not to impose a more rigorous standard than the one that was applied." 1993 U.S.C.C.A.N. at 1899.

C. Courts must give prison officials deference under RLUIPA.

The Court subsequently held that RFRA exceeded Congress's enforcement powers under Section 5 of the Fourteenth Amendment and therefore could not be applied to the states. *City of Boerne v. Flores*, 521 U.S. 507 (1997). Resorting to its powers under the Spending and Commerce clauses, Congress responded to *Boerne* by enacting RLUIPA in 2000. The law is much like RFRA, except that it targets only two areas: land-use regulations and persons residing in institutions that receive federal funds. With regard to the latter, Section 3 of RLUIPA provides that governments shall not "impose a substantial burden on the religious exercise of a person residing in or confined to an institution unless the government demonstrates that imposition of the burden (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering

that compelling government interest." 42 U.S.C. § 2000cc-1(a).

As with RFRA, "[c]ontext matters" when applying RLUPA's strict-scrutiny standard. *Cutter*, 544 U.S. at 723 (2005) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003)). The Court held in *Cutter* that RLUIPA must be applied "in an appropriately balanced way" and "with particular sensitivity to security concerns." *Id.* at 722. A religious accommodation "must be measured so that it does not override other significant interests." *Id.* at 721. RLUIPA was not intended "to elevate accommodation of religious observances over an institution's need to maintain order and safety." *Id.* at 722. In fact, "[l]awmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety, and security in penal institutions. " *Id.* at 710. Therefore, reviewing courts must "apply the Act's standard with due deference to the expertise and experience of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security, and discipline, consistent with consideration of costs and limited resources." *Id.* at 723 (internal quotation marks omitted) (quoting 146 Cong. Rec. S7774, S7775 (daily ed. June 27, 2000) (joint statement of Sens. Hatch and Kennedy on RLUIPA)).

The deference passage in *Cutter* was based on more than legislative history. It was also based, in part, on the constitutional avoidance canon of statutory construction. RLUIPA represents Congress's effort to navigate the corridor between the Free

Exercise Clause and the Establishment Clause. A statute that "unyielding[ly]" weighs the interests of those who desire a religious accommodation "over all other interests" is invalid under the Establishment Clause. *Cutter*, 544 U.S. at 722 (citing *Estate of Thorton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985), which invalidated a state statute under the Establishment Clause because it provided Sabbath observers with an unqualified right not to work on their Sabbath day); *see also Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334-35 (1987) (noting that, at some point, "accommodation may devolve into an unlawful fostering of religion") (quoting *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 145 (1987)). The Constitution itself therefore requires that prisoners' religious claims be balanced against prisons' legitimate security needs.

Giving prison officials deference does not mean courts should rubber stamp prison officials' conclusory assertions regarding security concerns. But it does mean courts should place considerable weight on the positions taken by cautious prison officials with vast experience. And, given the realities of prison administration, it means reviewing courts should (1) not insist on data, studies, or concrete examples because prisons need to devise prophylactic rules; (2) respect complex tradeoffs that are inherent in prison administration and allow prison officials to address part of a problem or regulate incrementally; (3) allow prisons to adopt policies that diverge from

what some (or even most) other prisons have; and (4) avoid imposing administrative requirements that cannot be found in RLUIPA.

1. Courts should not insist on data, studies, and examples.

A refusal to rubber stamp the policy judgments of prison officials does not mean that courts should insist on studies, data, or concrete examples. In *Beard v. Banks*, 548 U.S. 521, 531-35 (2006), the Court held that a prison official's testimony that a regulation served its intended functions was sufficient because the articulated connections between the regulation and the penological objective were "logical ones." The court of appeals offered "too little deference to the prison officials' judgment" in striking down a prison policy on the basis that the prison failed to show that the policy had "proven effective" with inmates or had a "real" basis in human psychology. *Id.* at 535. Even under a strict-scrutiny standard, prison officials must have flexibility to adopt innovative solutions and prophylactic rules before an incident occurs; the risks are too great to always demand greater proof to justify prison officials' predictive judgments.

In some cases, data will be lacking because prison systems simply do not have it. Running a prison is often more of an art than a science. The framework of *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), which requires district judges to

prevent juries from hearing the testimony of junk scientists whose opinions are not formulated with appropriate rigor, makes little sense here. *But see* Pet. Br. 49-50. When a correctional officer finds a small piece of a razor on the floor, for example, he is unlikely to know the means by which it came into the prison. *See, e.g.*, *Smith v. Ozmint*, No. 9:04-01819, 2010 WL 1071388, *4 (D.S.C. Jan. 25, 2010) (noting that a number of handcuff keys had gone missing from a prison; guards speculated that inmates with long hair and beards were able to conceal the keys in their hair or beards; and the keys were eventually located after the inmates were subjected to haircuts and shaves). And even if a correctional officer were to pull a piece of a razor out of an inmate's beard, he will not necessarily input the information into a database that tracks whether contraband has been secreted in facial hair as opposed to an inmate's shoes or a bodily orifice.

Moreover, prisons often adopt prophylactic rules designed to prevent problems *before* they arise. As Judge Jolly has explained,

> [I]t is difficult to imagine what additional evidence the state *could* put forth to demonstrate the legitimacy of its security concern. After all, the state's interest in *preventing* violence, and a prison's firsthand experience of inmate behavior may lead to a subjective determination regarding the threat of future violence over [an accommodation] that defies "proof" in the form of studies or documentation of any sort. Arguably, then, by requiring

> a higher evidentiary showing, [lower courts are improperly] requiring empirical evidence such as an actual outbreak of violence before [they] will cede that a prison's security concern is "legitimate."

Moussazadeh v. Texas Dep't of Criminal Justice, 709 F.3d 487, 493 (5th Cir. 2013) (Jolly, J., dissenting from denial of rehearing en banc) (emphasis in original).[11]

This Court has long recognized prison officials' need to take prophylactic measures and therefore has not required studies and the like before according deference to prison administrators. *See Turner v. Safley*, 482 U.S. 78, 89 (1987) (noting that prison officials must "anticipate security problems" before they occur and "adopt innovative solutions"; the "intractable problems of prison administration" could not be solved if prison officials must wait passively for inmates to disrupt security before acting); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 132-33 (1977) ("Responsible prison officials must be permitted to take reasonable steps to forestall threat[s] [to security], and they must be permitted to act before the time when they can compile a dossier

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[11] For this reason, the sliding-scale, multi-factored approach to deference set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) – which has historically been applied to agencies' legal interpretations contained in opinions, letters, and other modes of communication that do not have the force of law – likewise has no relevance to the entirely different situation of a prison official's courtroom testimony in a free-exercise case. *But see* Pet. Br. 50-51.

on the eve of a riot.") (citation and quotation omitted). In *Bell*, for example, the district court criticized security measures that it found to be overreaching and unsupported by evidence that hardback books were actually used to smuggle contraband: "With no record of untoward experiences at places like the [federally operated prison in New York], and with no history of resort to less restrictive measures, [Petitioners'] invocation of security cannot avail with respect to the high constitutional interests here at stake." 441 U.S. at 550-51 & n.32. This Court rejected the district court's reasoning, focusing instead on the *Jones* Court's recognition that prison officials need to devise prophylactic rules before security concerns emerge. In a similar vein, the *Bell* Court upheld the prison's post-visitation "strip search" policy, even though there had been only one documented instance in which an inmate attempted to sneak contraband back into the facility. *Bell*, 441 U.S. at 559. Lower courts have properly followed that reasoning in both pre- and post-RLUIPA cases.[12]

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[12] *See, e.g.*, *Fromer v. Scully*, 874 F.2d 69, 75 (2d Cir. 1989) (holding that a witness's inability to offer examples of contraband discovered in inmates' beards was not persuasive because prison officials must anticipate security problems before they occur); *Casey v. Lewis*, 4 F.3d 1516, 1521 (9th Cir. 1993) (noting that the "failure to specify a past event" that threatened institutional security "does not render irrational the adoption and implementation of a policy" to address future events that might pose a threat); *Kuperman v. Wrenn*, 645 F.3d 69, 75 (1st Cir. 2011) ("[C]ourts do not require an *actual* breach of security before upholding a regulation designed to prevent it."); *Ragland*

(Continued on following page)

2. Courts should respect tradeoffs and allow prison officials to address part of a problem.

No statute or rule "pursues its purposes at all costs," without reference to competing interests. *Rodriguez v. United States*, 480 U.S. 522, 525-56 (1987). For this reason, the fact that a statute or rule has made exceptions or failed to address the entire scope of a problem does not cast doubt on the strength of a governmental interest. The tax code, for example, contains many religious and secular exemptions; but that does not mean that the government's compelling interest in generating revenue is unworthy of credence or that additional accommodations for religious objectors to the tax code must be made. *Hernandez v. Comm'r*, 490 U.S. 680 (1989); *United States v. Lee*, 455 U.S. 252 (1982); *see also Hobby Lobby*, 573 U.S. ___, slip op. at 40 (acknowledging the Government's argument that "[e]ven a compelling interest may be outweighed in some circumstances by another even weightier consideration").

In the prison context, corrections professionals should not be stripped of deference just because a regulation makes exceptions or only partially addresses a problem. For example, a prison might be able to solve its contraband problem altogether by

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v. Angelone, 420 F. Supp. 2d 507, 514 (W.D. Va. 2006) ("[A] reviewing court generally need not also require prison officials to produce data proving that the predicted problems will occur or did occur before the policy was implemented.").

requiring all of its prisoners to go shoeless and naked, shorn of all bodily hair, permanently shackled, deprived of visitors, confined to solitary cells, and forced to wear a mask that covers the mouth. But that sort of regime would run contrary to the prison's rehabilitative goals and pose grave constitutional concerns. The fact that contraband can be hidden in a variety of other places on the person (*i.e.*, head hair, shirt pockets, pants cuffs, shoes, body orifices, etc.) does not mean that ADC has no compelling interest in preventing contraband from being transported in a beard. As one court explained,

> That argument would have [a court] validate only regulations that left absolutely no hiding places on the person of prisoners. The fact that a prison uniform has one pocket hardly creates a constitutional imperative that several pockets be provided. Such an all or nothing approach would leave prison officials no leeway in designing workable search procedures.

Fromer, 874 F.2d at 75. Thus, contrary to Petitioner's implicit contention (Pet. Br. 35-36), prison officials are not put to the choice of either requiring prisoners to go naked or allowing beards under the theory that only a regulation that forbids both clothes and beards can avoid being labeled "underinclusive."

3. Courts should allow divergent assessments of risk among different prison systems.

RLUIPA does not mandate a one-size-fits-all method of prison administration, and prison officials do not lose their entitlement to deference just because they have not adopted the practices of other jurisdictions. As the Court held in *Bell*, 441 U.S. at 554, the Free Exercise Clause "does not mandate a 'lowest common denominator' security standard, whereby a practice permitted at one penal institution must be permitted at all institutions." That rationale applies with equal force to RLUIPA claims. *Knight v. Thompson*, 723 F.3d 1275, 1286 (11th Cir. 2013) ("While the practices of other institutions are relevant to the RLUIPA analysis, they are not controlling – the RLUIPA does not pit institutions against one another in a race to the top of the risk-tolerance or cost absorption ladder."). Divergent assessments of risk are to be expected in our federal system.

4. Courts should not impose extra-statutory administrative requirements.

Some lower courts have grafted a "consider-and-reject" requirement that has no foundation in RLUIPA's text. *See* Br. for United States as *Amicus Curiae* for Pet. 18-19. In rejecting that reasoning, the Eleventh Circuit correctly observed that RLUIPA's language directs courts "to inquire merely whether the policy under review is the least restrictive means

of furthering a compelling government interest." *Knight*, 723 F.3d at 1286. RLUIPA "asks only whether efficacious less restrictive measures actually exist, not whether the defendant considered alternatives to its policy." *Id.*; *cf. Wos v. E.M.A.*, 133 S. Ct. 1391, 1409 (2013) (Roberts, C.J., dissenting) (noting that "Congress is not obligated to make a record of the type that an administrative agency or court does to accommodate judicial review" and that "[s]overeign States should be accorded no less deference"); *see also Fegans*, 537 F.3d at 907 (holding that RLUIPA does not call "for the federal courts to impose procedural requirements on the internal disciplinary processes used by prison administrators" and that the prisoner was afforded individualized consideration at the bench trial, which is all the statute requires).

II. ADC's grooming policy furthers compelling governmental interests in prison safety and security.

Respondents have not contested Petitioner's assertion that ADC's no-beard policy imposes a substantial burden on his religious exercise. With that threshold showing met, RLUIPA asks whether the policy furthers a compelling governmental interest in the least restrictive manner. 42 U.S.C. § 2000cc-1(a). It does. As an initial matter, the interests ADC has asserted – prison safety and security – are undeniably compelling; and the no-beard policy directly advances those interests.

A. Prison safety and security are compelling governmental interests.

"Central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves." *Bell*, 441 U.S. at 547 (quoting *Pell*, 417 U.S. at 823). "Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry." *Id.* Given the dangerous and "volatile" nature of prisoners, administrators are obligated "to take all necessary steps to ensure the safety of not only prison staffs and administrative personnel, but also visitors [and] the inmates themselves." *Hudson*, 468 U.S. at 526-27.

The Court confirmed the compelling nature of this interest in *Cutter,* where inmates sued prison officials for failing to accommodate the practices of non-traditional sects like the Satanist, Wicca, and Asatru religions. The Court declined to read RLUIPA in the expansive manner urged by the prisoners: "[W]e do not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety. Our decisions indicate that an accommodation must be measured so that it does not override other significant interests." 544 U.S. at 722. The Court further stated explicitly that "*prison security is a compelling state interest*," and "deference is due to institutional officials' expertise in this area." *Id.* at 725 n.13 (emphasis added).

B. ADC's no-beard policy furthers its compelling interests.

Prison safety and security is threatened in countless ways, from riots to prisoner-on-prisoner fights, to attacks on correctional officers, to prison gang violence. ADC's no-beard policy enhances prison safety and security by removing an important hiding place for contraband and by facilitating the identification of inmates who wish to engage in violence or escape.

1. Contraband. This Court has long recognized that prison officials "must be ever alert to attempts to introduce drugs and other contraband into the premises which is one of the most perplexing problems of prisons today; they must prevent, so far as possible, the flow of illicit weapons into the prison; they must be vigilant to detect escape plots, in which drugs or weapons may be involved, before the schemes materialize." *Hudson*, 468 U.S. at 527. Guns, knives, razor blades, glass shards, and illegal drugs are obvious threats to prison security. But even "[e]veryday items can undermine security if introduced into a detention facility. " *Florence*, 132 S. Ct. at 1519. The *Florence* Court explained that matches can be used to commit arson; cell phones can be used to orchestrate violence and criminality both inside the prison and outside prison walls; pills enhance suicide risks; chewing gum can block locking devices; hairpins can open handcuffs; ink pens can be made into weapons; and otherwise scarce items can be used as the currency that lubricates illicit transactions. *Id.*

As Lay and Harris testified, beards are places where prisoners can hide contraband. They offered specific examples of contraband (such as needles, homemade darts, pieces of broken razors, drugs, and SIM cards) that could be concealed in a beard, especially when it hides the skin. J.A. 80, 84, 115-17, 124. Other items, such as pieces of fence wire, staples, and paperclips can be concealed in a trim beard. And gum or window caulk can be used as an adhesive to help keep the items hidden in the beard for as long as necessary to make it through a security checkpoint.

Petitioner candidly acknowledges that the State has "a legitimate governmental interest in maintaining security for inmates and staff alike and in the staunching of the flow of contraband," J.A. 18, and he readily admits that allowing beards would undermine those security concerns. J.A. 57. He is right. The effects of contraband can obviously be deadly. Contraband can even be dangerous to the prisoner who possesses it. At a hearing in another grooming case, for example, current ADC Director Ray Hobbs testified about an incident that occurred during the summer of 2013 in which an inmate with a beard arrived from a county jail. The new inmate had concealed a razor blade in his beard, and then used it to commit suicide later that evening. *See* Testimony of Director Ray Hobbs, *Jones v. Meinzer*, No. 5:12CV00117, DE 91, at 78-79 (E.D. Ark. Oct. 17, 2013).

2. Identification. Inmate identification is vitally important both inside and outside the prison. A prison's no-beard policy "assists in the accomplishment of institutional security by minimizing an inmate's ability to alter his appearance rapidly and significantly." *Hill v. Blackwell*, 774 F.2d 338, 344 (8th Cir. 1985); *see also* J.A. 80. A beard has a significant impact on a person's appearance, and it can be shaved in seconds.

Inmates have shaved their beards to disguise themselves in prison, allowing them to escape or inflict harm.[13] Beards can also make inmates "resemble

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[13] *See, e.g.*, Tony Bustos, *15 Days of Anguish*, The Arizona Republic, 2004 WLNR 22983497 (March 21, 2004) (describing an incident in which an inmate subdued a correctional officer in the prison's kitchen, stole the officer's uniform, shaved his own beard, and used the disguise to fool another guard in the watchtower; the prisoner took control over the watchtower and the guns kept there, leading to a 15-day standoff); Jack Petrick, *Mix-up Frees Mob Informant*, New Jersey Record, 2008 WLNR 19146026 (Oct. 7, 2008) (reporting an instance in which a man convicted of armed robbery escaped from a New Jersey prison by shaving his beard, donning dress clothes, and walking past security guards); Vernon Scott, *A Prison Escape, Hollywood Style*, United Press International (Jan. 10, 1998) (reporting about an Illinois prisoner's escape plan, which included a shaved beard that, according to correctional officers, made them unable to identify the prisoner); Joseph Szydlowski, *Jail Escapee Eludes Capture*, Cincinnati Post, 2007 WLNR 12130584 (June 26, 2007) ("Definitely changed is Artrip's appearance. Shortly before his escape, he shaved a full beard he sported in his jail photo."); Jeff Richgels, *Inmate Found Outside of Cell*, Capital Times, 1993 WLNR 1978554 (Sept. 28, 1993) (reporting on an inmate's

(Continued on following page)

other inmates" who also have beards, giving rise to impersonations and the possibility that an inmate will use another inmate's identification card "to get into areas of the prison where they do not belong." *Gooden v. Crain*, 353 Fed. Appx. 885, 889 (5th Cir. 2009). Beards also make it "difficult to quickly identify and recapture inmates if they escape." *Id.* at 889.[14] A no-beard policy can facilitate the prompt recapture of escapees, and such policies have been effective in the past. *Shabazz v. Barnauskas*, 600 F. Supp. 712, 716 (M.D. Fla. 1985).

There are, to be sure, other ways an inmate may alter his appearance after an escape, such as wearing

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ability to breach security after sneaking past prison guards, shaving his beard, and donning the uniform of a trustee).

[14] *See also* Karen Aho, *Escaped Peeping Tom Caught*, Anchorage Daily News, 1999 WLNR 7355183 (Oct. 9, 1999) (reporting the capture of an Alaska prisoner who shaved his beard after escaping and evading detection for a year); *California Prisons Enforce New Grooming Standards*, Charleston Gazette & Daily Mail, 1997 WLNR 630834 (Dec. 31, 1997) (discussing two instances in which inmates shaved their beards as part of their escapes from California prisons); Carolyn Starks and Mark S. Warnick, *City Bus Station End of Line for Prisoner*, Chicago Tribune, 1997 WLNR 5783169 (Dec. 7, 1997) (reporting on a Minnesota inmate's post-escape decision to shave his beard so as to avoid detection); *Escaped Prisoner Captured in Department Store*, Associated Press (Dec. 12, 1985) (reporting on an instance in which an Oklahoma inmate went from bearded to clean-shaven after an escape); John Allard, *Officers Try to Trap Escaped Murderer*, Columbia State Record, 1994 WLNR 1293344 (Sept. 11, 1994) (reporting the inability of 60 investigators, a helicopter, and a bloodhound team to find an escaped South Carolina murderer who shaved his beard after an escape).

a wig, applying cosmetics, donning sun glasses, and so forth. But ADC has a legitimate interest in regulating a particularly profound way to change one's appearance that is within ADC's control and which can affect the search in the initial precious minutes following an escape attempt. *Hill*, 774 F.2d at 347 (noting that beards "cover a number of identifying facial features" and can "significantly alter an individual's appearance"). In addition, an inmate's ability to alter his appearance *after* an escape by wearing a wig or sunglasses says nothing about an inmate's ability to alter his appearance to effectuate the initial escape or gain unauthorized access to an area while still inside prison walls.

C. The medical exception does not prove that ADC's no-beard policy fails to serve a compelling interest.

ADC's narrow exception for prisoners who require quarter-inch beards for diagnosed medical conditions does not show that the grooming policy fails to further a compelling governmental interest. A grooming policy need not be an all-or-nothing proposition. As explained above, statutes and rules rarely pursue a single purpose at any cost, without reference to competing interests. *See* part I.C.2, *supra*. Respondents have identified both qualitative and quantitative differences between the particular religious exemption requested by Petitioner and the existing medical exception. *Yellowbear v. Lampert*, 741 F.3d 48, 61 (10th Cir. 2014) (noting that a government can

rebut an argument from underinclusion by identifying quantitative or qualitative differences).

The medical exemption allows inmates with skin conditions to shave with electric clippers instead of using razors. To qualify for such an exemption, the inmate must be seen by medical personnel, have a diagnosed dermatological condition, and receive a medical prescription that would allow for the use of electric clippers. Inmates with prescriptions trim their facial hair as close to the skin as possible without aggravating the sensitive areas. J.A. 109; Affidavit of Warden Randy Watson, *Jones v. Meinzer*, No. 5:12CV00117, DE 61-6, ¶ 7 (E.D. Ark. June 21, 2013); *id.* at DE 91, p. 22 (testimony of Assistant Director Grant Harris). The facial hair cannot exceed one-fourth of an inch, and the facial skin is still visible after the shave. J.A. 124.

As a quantitative matter, the medical exception has a far smaller impact than the proposed religious exception. Medical prescriptions for clipper shaves are oftentimes temporary in nature. *See* Testimony of Director Ray Hobbs, *Jones v. Meinzer*, No. 5:12CV00117, DE 91, at 78. If an inmate is suffering from a dermatological condition, it is incumbent upon the medical staff to treat the condition and try to resolve it, which could negate the inmate's need to utilize the exemption. Moreover, "[t]he number of inmates warranting a medical exemption to the grooming policy is quite small, but the number of inmates likely to seek qualification for a religious exception would be much greater." *Green v. Polunsky*, 229 F.3d 486, 491 (5th

Cir. 2000); *see also* J.A. 109 (testifying that "not a very high percentage" of inmates have facial hair under the medical exception); Affidavit of Warden Randy Watson, *Jones v. Meinzer*, No. 5:12CV00117, DE 61-6, ¶ 5 (E.D. Ark. June 21, 2013); *id.* at DE 91, pp. 22-27 (Assistant Director Harris testifying that ADC's allowance of facial hair for medical conditions is a rare exception that typically applies to inmates with burns or scars; forcing inmates to use razors directly on burned or scarred skin would implicate Eighth Amendment concerns; and the witness had not been apprised of any current inmate who had any sort of "beard" under the medical exception); *see also* part III.B, *infra* (discussing ADC's substantial Muslim inmate population, other religions that require beards, and opportunistic conversion).

As a qualitative matter, the short length of facial hair remaining after a guardless clipper shave makes the quarter-inch beard a far less likely place to conceal contraband. Also, prison administrators can visually inspect a face that has received a guardless clipper shave without having to put their hands on the inmate's face. J.A. 124. Further, any remaining facial hair is less likely to hide the contours of the face, making it much more difficult for inmates attempting to hide contraband in their mouths to succeed.

In short, ADC's more relaxed restrictions for inmates with diagnosed dermatological conditions do not render unreasonable its belief that longer beards pose security concerns. *Hill*, 774 F.2d at 346-47. To

the contrary, the regulation evidences an appropriate balancing of competing interests and "sensitivity on the part of prison officials to the medical needs of inmates." *Id.*

III. ADC's grooming policy is the least restrictive means of furthering its governmental interests.

ADC's no-beard policy is the least restrictive means of accomplishing the compelling governmental interests just described. A proposed alternative rule constitutes a less restrictive alternative only if it would be equally as effective in achieving the compelling governmental interest. *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 846 (1997) (holding that a policy is not the least restrictive means if feasible alternatives "would be at least as effective in achieving [the policy's] legitimate purposes"); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000) (noting that a less restrictive alternative must be "at least as effective" in achieving the legitimate purpose that the statute was enacted to serve); *Hobby Lobby*, 573 U.S. ___ (2014), slip op. at 44 (concluding that the government's existing accommodation for nonprofit religious institutions served the government's interest "equally well" and, therefore, was a less restrictive means); *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 665 (2004) (noting the government's burden to refute the effectiveness of means proposed by the plaintiff). A no-beard policy is more effective than a policy that would

allow all inmates to wear a half-inch beard or that would allow the hundreds or thousands of religious objectors to wear a half-inch beard.

A. A policy of allowing all prisoners to grow a half-inch beard is not a less restrictive alternative.

A policy of allowing all inmates to wear a half-inch beard upon request would not be as effective as ADC's current no-beard policy and, therefore, is not a less restrictive means. Half-inch beards would still give rise to the contraband problems that the current policy seeks to avoid. And half-inch beards would still pose identification problems. These problems would not be cured by Petitioner's proposed work-arounds.

1. Allowing half-inch beards would give rise to contraband problems, which would not be cured by Petitioner's proposed responses.

One's body is often the most efficient place to hide small objects quickly while drawing the least amount of attention to oneself. A half-inch beard can easily accomplish the inmate's goal while thwarting efforts to prevent small, dangerous objects from entering the prison. At the preliminary injunction hearing, Lay and Harris testified about specific items of contraband that could be hidden in a half-inch beard. Darts, needles, pieces of wire, pieces of broken glass, razor blades, tobacco, marijuana, and other powdered drugs can all be hidden in a half-inch

beard. J.A. 80, 84, 116, 117; *see also Jones*, 2013 WL 5676886, at *5. Integral components of cellular phones, such as SIM cards, can also be secreted in a half-inch beard. J.A. 117. A trim beard can also obscure the contours of the face and help disguise items concealed by inmates inside of their mouths. *Jones*, 2013 WL 5676886, at *6.

Lay and Harris's testimony was based upon their combined 70 years of experience in corrections. Both men have worked at various levels within the organizational hierarchy. They have worked around inmates for most of their careers, and they have first-hand knowledge of inmates' habits and routines. They know that inmates who are housed in maximum-security facilities, such as Petitioner, spend much of their time figuring out ways to undermine prison security.

Petitioner questioned Lay and Harris about two proposed ways to address those contraband concerns: (1) indefinite housing in administrative segregation and (2) hands-on inspection by staff. ADC presented testimony persuasively explaining why the proffered alternatives were unworkable, and Petitioner presented no evidence to rebut ADC's evidence that the options were not feasible.

Petitioner first suggested that he, and presumably any other inmate who desired to grow a half-inch beard, could be housed in administrative segregation for as long as he wished. J.A. 74. Respondents rejected this option based upon an Eighth Circuit case holding that indefinite administrative segregation

may violate due process. *Williams v. Hobbs*, 662 F.3d 994 (8th Cir. 2011); *see also Hewitt v. Helms*, 459 U.S. 460, 477 n.9 (1983) (holding that "administrative segregation may not be used as a pretext for indefinite confinement of an inmate" and that, accordingly, "[p]rison officials must engage in some sort of periodic review of the confinement of such inmates").

Petitioner also recommended that correctional officers physically inspect inmates' half-inch beards on a frequent basis. J.A. 107; *see also* Pet. Br. 37-38. But such inspections of inmates' beards would pose legitimate safety concerns. A correctional officer who is required to run his hands through an inmate's beard could get cut or pricked with dirty needles or broken razorblades. J.A. 130. Thus, "guards conducting searches for [drugs and weapons in beards] would be exposed to unnecessary risks of harm." *Green*, 229 F.3d at 490; *Limbaugh v. Thompson*, No. 2:93CV1404, 2011 WL 7477105, *7 (M.D. Ala. July 11, 2011) ("Requiring correctional officers to search long hair for contraband or weapons constitutes a safety and health hazard to the correctional officers."). Beard searches would also substantially increase the opportunities for confrontation between inmates and correctional officers. *Fromer*, 874 F.2d at 76. Indeed, searching a beard is risky because putting hands around a person's mouth is particularly invasive and enhances the risk of an altercation. An angry inmate could even bite a correctional officer. *Jones*, 2013 WL 5676886, at *5.

Petitioner argues for the first time in this Court (Pet. Br. 37) that inmates should be allowed to run

their own fingers through their facial hair. But that is not a realistic solution, either. "[A]n inmate secreting contraband [in a beard] can manipulate the search and avoid detection of the contraband." *Limbaugh*, 2011 WL 7477105, at *7. If an inmate were to hide contraband in his beard, he would predictably manipulate the self-search in ways that avoid detection.

2. Allowing half-inch beards would give rise to identification problems, which would not be cured by multiple photographs.

The identification-related problems with beards would not be solved by limiting their lengths to one-half of an inch. The security problem is created by the *change* in a prisoner's appearance; and the principal change in appearance comes from the initial growth from no beard to a half-inch beard, not the incremental increases thereafter.

Petitioner says that ADC need only take an initial clean-shaven photograph during the intake process and another photograph after the beard has reached its maximum length. But common sense tells us that "dual pictures would provide limited help in helping guards locate an inmate that wanted to quickly and momentarily alter his appearance *in* prison" because "[t]he guards would be forced to turn to photographic records of some sort rather than quickly relying on their own recognition of an inmate's appearance." *Hart v. CSP-Solano*, No. CIV-02-0577, 2005 WL 1683581, at *5 n.9 (E.D. Cal. July

8, 2005). What is more, obtaining a clean-shaven photograph of an inmate is not always possible. An inmate could refuse to shave his beard upon entry into ADC, just as Petitioner did.

In addition, "serial rephotography" imposes "disciplinary and administrative problems." *Fromer*, 874 F.2d at 76. Keeping up with further significant changes to inmates' appearances would prove to be administratively burdensome on an already strained staff, whose primary goal is to provide safety to the inmates and staff members of each institution. Saying in a written policy that a prison will keep up with significant changes in inmates' appearances is one thing; having an overworked staff fully implement such a policy is something else altogether. Potential administrative problems abound. Inmates may not cooperate with the taking of additional photographs, requiring disciplinary action. Inmates can shave before their photographs are taken and "easily thwart" a policy of maintaining updated photographs. *Id.*

Finally, there is no evidence to suggest that a serial-photograph regime would work. A court is in no position to say that "preparation, storage, maintenance, and dissemination to the world of law enforcement agencies (and other sources) two photographs to be used to recapture an escapee is a feasible means of furthering the state's interest." *Shabazz v. Barnauskas*, 790 F.2d 1536, 1540 (11th Cir. 1986). Courts are rightfully suspicious of the notion that "it works as well to present a potential source of identification with two pictures." *Id.*

3. Allowing half-inch beards would create administrative problems.

A policy allowing half-inch beards would also create administrative difficulties beyond the taking of multiple photographs. ADC administrators expressed concern with how they would monitor beard lengths if Petitioner, as well as other ADC inmates, were allowed to maintain beards. J.A. 83. Respondents testified that people have different hair types, and their facial hair grows at different thicknesses and rates. J.A. 84. Unlike quarter-inch facial hair, a half-inch beard generally covers the skin as well as the contours of the face. J.A. 124. Therefore, it is not easy to determine visually whether a beard has grown longer than half an inch and no longer complies with the policy.

Respondents testified that they did not see a workable method of gauging beard lengths without touching the inmates and using a measuring tape to precisely measure the length of potentially hundreds of beards on a frequent basis. J.A. 107. The logistics associated with measuring every beard would be taxing on an already over-taxed staff. J.A. 86. Further, disagreements as to the length of the beard could create arguments between inmates and staff, whose relations are oftentimes tenuous at best.

Finally, courts have recognized that "[c]onducting such operations under dangerous conditions would greatly increase the time and expense of running the prison system." *Green*, 229 F.3d at 490; *Limbaugh*,

2011 WL 7477105, at *7 (holding that long hair "exacerbates the difficulty of and length of time necessary to search for contraband"). So, too, would a policy allowing inmates to have half-inch beards.

4. Other prison systems' experiences, while relevant, are not dispositive.

Petitioner argues at length (Pet. Br. 21-32) that ADC's grooming policy fails because 44 other state and federal prison systems would allow a half-inch beard.[15] But Petitioner does not offer any evidence regarding the "experiences" of other prison systems. He merely notes that a law professor, with the help of student researchers, determined that the vast majority of prisons currently allow facial hair of some length. *See* Dawinder S. Sidhu, *Religious Freedom and Inmate Grooming Standards*, 66 U. Miami L. Rev. 923 (2012). Nothing in that article explains *why* prisons moved in this direction. It is perfectly possible that prison systems made hard choices as a means of dealing with voluminous grievances and relentless litigation, not because the efficacy of the more restrictive grooming policies had been cast in doubt. Nothing in Professor Sidhu's article or the record in this case sheds light on any state prison's actual "experience" with a more permissive policy.

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[15] The January 2012 hearing focused on only two jurisdictions: California and New York. Petitioner examined Lay and Harris about their knowledge of the policies in those states, to which they responded they did not have any specific knowledge.

In any event, while the practices of other institutions are relevant to the RLUIPA analysis, they are not controlling. As explained in part I.C.3, *supra*, RLUIPA "does not pit institutions against one another in a race to the top of the risk-tolerance or cost-absorption ladder." *Knight*, 723 F.3d at 1286; *see also Daker v. Wetherington*, 469 F. Supp. 2d 1231, 1239 (N.D. Ga. 2007) (interpreting RLUIPA to leave "room for a particular prison to decline to join the 'lowest common denominator' when, in the discretion of its officials, the removal of a challenged restriction poses an appreciable risk to security"). ADC has shown that Petitioner's requested exemption poses actual security and safety risks. The fact that other jurisdictions have chosen to allow male inmates to maintain beards "shows only that they have elected to absorb those risks," *Knight*, 723 F.3d at 1286, whereas Arkansas's prison system has not. RLUIPA does not "force institutions to follow the practices of their less risk-averse neighbors. " *Id.* ADC has shown that its departure from the practices of other jurisdictions stems not from a stubborn refusal to accept a workable alternative, but rather from a "calculated decision not to absorb the added risks that its fellow institutions have chosen to tolerate." *Id.*

B. A policy of allowing half-inch beards for all prisoners who claim a religious need to have a beard is not a less restrictive alternative.

"[T]he Government can demonstrate a compelling interest in uniform application of a particular program" – and therefore not allow any exceptions, even for religious reasons – "by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program." *Gonzales v. O Centro Espirita Beneficent Uniao do Vegetal,* 546 U.S. 418, 435 (2006). A grooming policy that makes religious-based exceptions for half-inch beards, just like a policy that allows half-inch beards for everyone, would produce the same contraband and identification concerns discussed above.

The number of inmates who will likely seek a religious-based exemption is large. ADC currently has 1,737 Muslim inmates, which amounts to nearly 12% of its prison population. Of course, not all Muslim inmates will want beards. On the other hand, Islam is not the only religion in which some adherents feel compelled to wear beards. *See, e.g.*, *Fegans*, 537 F.3d at 900 (deciding a beard case in which an ADC prisoner followed the teachings of the Assemblies of Yahweh); Testimony of Chaplain Don Yancy, *Jones v. Meinzer*, No. 5:12CV00117, DE 91, at 62-63 (testifying

about religious sects that require beards). Opportunistic conversions are also likely.[16]

The question, then, is not whether ADC can handle one prisoner with a half-inch beard; it is whether having hundreds or thousands of prisoners with beards would jeopardize ADC's efforts to provide a secure and safe prison. For the reasons discussed above, it would. ADC has a "compelling interest in uniform enforcement of the policy," and questions such as whether a particular inmate "personally has ever or would ever actually hide contraband in his [beard], seek to change his identity, or fail to keep himself and his hair clean are beside the point." *Ragland*, 420 F. Supp. 2d at 518. A beard "presents these risks," and Respondents "have a compelling interest in alleviating such risks in like manner as when any inmate fails to comply with the policy." *Id.*

To the extent Petitioner says that we should ignore all other potential religious objectors and should focus only on him, he is on even weaker

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[16] The possibility of opportunistic conversions is hardly speculation. *See, e.g.*, Testimony of Assistant Director Grant Harris, *Jones v. Meinzer*, No. 5:12CV00117, DE 91, at 44 (testifying how ADC experienced a significant increase in the number of inmates who claimed to require a Common Fare meal for religious reasons, including 1,500 to 1,600 requests for such meals during one period; constructed a separate kitchen to accommodate the voluminous requests; and now has one inmate in the entire prison system who wants a Common Fare meal).

ground. It is true that Petitioner has not yet introduced contraband from the outside world into the prison (to Respondents' knowledge) or tried to escape. But those facts say nothing about the probability of such things in the future. All inmates, including Petitioner, may have an incentive to obtain or conceal contraband. *Florence*, 132 S. Ct. at 1520. Moreover, Petitioner's pre- and post-incarceration history of violence and disputes does not lend comfort to an appropriately cautious prison administrator.[17] *See, e.g.*, J.A. 71, 81, 83. ADC has a compelling interest in applying its grooming policy to Petitioner, just like other inmates.

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[17] Petitioner says he based his request on a half-inch beard after reading a Ninth Circuit case. J.A. 66. But he fails to acknowledge that factors relevant to an individualized inquiry in the Ninth Circuit would weigh against allowing Petitioner to have a trim beard, given his violent past. *See Warsoldier v. Woodford*, 418 F.3d 989, 998-99 (9th Cir. 2005) (distinguishing cases that upheld long-hair prohibitions in maximum security prisons; inmates at minimum-security facility, such as one where the plaintiff was incarcerated, "pose fewer security risks" and are "less likely to attempt to escape" because they "have less serious criminal histories" and are often permitted "to leave the premises to work and may sleep in unlocked dorm rooms").

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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July 23, 2014

REPLY BRIEF

No. 13-6827

In the Supreme Court of the United States

GREGORY HOUSTON HOLT
A/K/A ABDUL MAALIK MUHAMMAD,
PETITIONER

v.

RAY HOBBS, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION, ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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INTRODUCTION

Respondents do not dispute that they offered no record example of any prisoner hiding anything in any beard; that they permit many hiding places better than a half-inch beard; or that their ban on beards conflicts with national accreditation standards and the policies of over forty states. They argue that such facts are irrelevant in light of the "great" and "wide-ranging deference" due to prison officials. Resp. Br. 29. They reject every possible means by which courts might evaluate their testimony, leaving only absolute deference.

But Congress enacted a different standard. It replaced rational-basis review with strict scrutiny, and shifted the burden of proof from prisoners to prison officials. Respondents may prefer a standard of "great and wide-ranging deference." But their standard has no basis in RLUIPA's text and would effectively repeal the statute.

ARGUMENT

I. Respondents Would Effectively Repeal RLUIPA's Statutory Standard of Compelling Interest and Least Restrictive Means.

RLUIPA provides "heightened protection" for religious exercise by requiring the government to satisfy strict scrutiny. *Cutter* v. *Wilkinson*, 544 U.S. 709, 714 (2005). Respondents argue that courts should instead give "great" and "wide-ranging deference" to prison officials. Resp. Br. 29. But their theory lacks textual support and would render RLUIPA nugatory.

A. Respondents start with a policy argument, claiming that "great deference" is required because judges "[i]n the calm serenity of judicial chambers" are

"ill-suited to appreciate the magnitude of a particular security risk." Resp. Br. 29-30. "[P]rison officials know better." Resp. Br. 30. Prison officials may know about prison security, but Congress found that they systematically undervalue religious freedom, often restricting it "in egregious and unnecessary ways." Joint Statement of Senators Hatch and Kennedy, 146 Cong. Rec. 16698, 16699 (2000). Thus, Congress tasked courts with "striking sensible balances between religious liberty and competing prior governmental interests." *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (quoting RFRA); *id.* at 2791 (Ginsburg, J., dissenting) (same).

Respondents claim that judicial review of prison policies raises "separation-of-powers" concerns. Resp. Br. 30-31. But the legislative and executive branches "plainly contemplate[d] that *courts* would recognize exceptions — that is how the law works." *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 434 (2006) (emphasis in original). This Court, when considering RFRA and RLUIPA, has repeatedly affirmed "the feasibility of case-by-case consideration of religious exemptions." *Id.* at 436 (characterizing *Cutter*).

Nor does RLUIPA create "federalism concerns." Resp. Br. 31. RLUIPA is Spending Clause legislation. 42 U.S.C. § 2000cc–1(b)(1). If respondents find it burdensome, they can decline federal funds, which are a tiny fraction of their budget. See Arkansas Department of Correction, *Annual Report 2013*, at 3, http://adc.arkansas.gov/resources/Documents/2013annualReport.pdf.

Next respondents claim (at 31-32) that their extreme version of deference is required by RFRA's legislative history, which cited *Weaver* v. *Jago*, 675 F.2d 116 (6th Cir. 1982). Even assuming that legislative history could override statutory text, respondents mischaracterize *Weaver*. *Weaver* held that prison officials' claims of necessity should be "but one factor in weighing the competing interests." *Id.* at 119. And "only those *interests of the highest order* and those *not otherwise served* can overbalance legitimate claims to the free exercise of religion." *Ibid.* (emphasis added); S. Rep. 103-111 at 10 (1993). That is a description of strict scrutiny.

Finally, respondents argue that total deference is required to avoid violating the Establishment Clause. Resp. Br. 34-35. But this Court unanimously rejected an Establishment Clause challenge in *Cutter*, because RLUIPA "alleviates exceptional government-created burdens on private religious exercise" and does not create "an absolute and unqualified right." 544 U.S. at 720, 722 (quoting *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703, 709 (1985)). The Court assumed that the compelling-interest test would be applied with "due deference" to prison administrators. *Id.* at 723. But it did not suggest absolute deference, or great and wide-ranging deference. Rather, it anticipated that the compelling-interest test would be applied "in an appropriately balanced way." *Id.* at 722. Appropriate balance requires that weight be given to religious interests as well as to security interests.

B. After invoking policy considerations, legislative history, and constitutional avoidance — but not the statutory text — respondents offer four principles for interpreting RLUIPA. Resp. Br. 36-43. None has any basis in the text or even legislative history. All are

drawn from pre-RLUIPA cases involving rational-basis review. Respondents do not deny that the courts below applied the pre-RLUIPA constitutional standard, Pet. Br. 52-55, and respondents argue for the same mistake here.

1. First, respondents say that prison officials need not provide any "studies, data, or concrete examples" to satisfy strict scrutiny. Resp. Br. 36. They need "prophylactic rules." *Ibid.* Nor must their testimony have any indicia of reliability, *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), or power to persuade, *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). Resp. Br. 36-37, 38 n.11; see Pet. Br. 49-52. Courts must accept their testimony even if it seems "almost preposterous." Resp. Br. 30.

In support, respondents cite four decisions from this Court. Resp. Br. 36-39. All four involved constitutional claims, where the Court applied rational-basis review and placed the burden of proof on the prisoner. See *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 128 (1977) ("[t]he burden was not on appellants [prison officials]," but on prisoners to offer "substantial evidence" that "officials have exaggerated their response"); *Bell* v. *Wolfish*, 441 U.S. 520, 561-562 (1979) (prisoners bear a "heavy burden of showing that these officials have exaggerated their response"); *Turner* v. *Safley*, 482 U.S. 78, 89 (1987) (prison regulation "is valid if it is reasonably related to legitimate penological interests"); *Beard* v. *Banks*, 548 U.S. 521, 529 (2006) (plaintiff "bears the burden of persuasion").

But RLUIPA places the burden of production and persuasion "squarely on the Government." *O Centro*, 546 U.S. at 429 (citing parallel provision of RFRA); 42

U.S.C. §§ 2000cc–1(a), 2000cc–5(2); U.S. Br. 22. And the burden is not just to establish a "logical" connection to penological objectives, Resp. Br. 36, but to satisfy strict scrutiny. Under that standard, "data" or at least "concrete examples" are often required. Respondents cannot wave "prophylaxis" like a magic wand.

In strict scrutiny cases, this Court has repeatedly held that "[b]road prophylactic rules in the area of free expression are suspect." *NAACP* v. *Button*, 371 U.S. 415, 438 (1963); see *Riley* v. *National Federation of the Blind*, 487 U.S. 781, 800 (1988) (invalidating "prophylactic" rules); *McCutcheon* v. *FEC*, 134 S. Ct. 1434, 1458 (2014) ("This 'prophylaxis-upon-prophylaxis approach' requires that we be particularly diligent in scrutinizing the law's fit."). Even under the more relaxed rules governing commercial speech, "broad prophylactic rules may not be so lightly justified." *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 649 (1985). Rather, the government must provide "evidence or authority" regarding "particular evils" that the rule would prevent. *Id.* at 648-649; see also *McCullen* v. *Coakley*, 134 S. Ct. 2518, 2534-2541 (2014) (prophylactic rules failed intermediate scrutiny).

When respondents finally cite a RLUIPA case, they cite a dissent. Resp. Br. 37-38 (quoting *Moussazadeh* v. *Texas Dep't of Criminal Justice*, 709 F.3d 487, 493 (5th Cir. 2013) (Jolly, J., dissenting from denial of rehearing en banc)). But *Moussazadeh* illustrates our point. There, Texas denied a kosher diet to a Jewish inmate despite the fact that Texas had been providing kosher diets to other inmates for two years without any security problems. *Moussazadeh* v. *Texas Dep't of Criminal Justice*, 703 F.3d 781, 794 (5th Cir. 2012).

The court properly ruled against the state because it "failed to produce evidence of security concerns." *Ibid.*[1]

2. Second, respondents argue that "the fact that a statute or rule has made exceptions or failed to address the entire scope of a problem does not cast doubt on the strength of the governmental interest." Resp. Br. 40. But *O Centro* and *Lukumi* say the opposite: "[A] law cannot be regarded as protecting an interest of the highest order * * * when it leaves appreciable damage to that supposedly vital interest unprohibited." *O Centro*, 546 U.S. at 433 (quoting *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 547 (1993)); see Pet. Br. 36 (collecting cases); U.S. Br. 20. Respondents quote (at 41) *Fromer* v. *Scully*, 874 F.2d 69, 75 (2d Cir. 1989), but *Fromer* was a "pre-RLUIPA decision" that was "much more deferential than the strict-scrutiny standard adopted by Congress in RLUIPA." *Young* v. *Goord*, 67 F. App'x 638, 640 (2d Cir. 2003). *Fromer* is no authority here.

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[1] Respondents mention four lower-court cases, all easily distinguishable. Resp. Br. 39-40 n.12. Two were decided under the deferential *Turner* standard. *Casey* v. *Lewis*, 4 F.3d 1516 (9th Cir. 1993); *Fromer* v. *Scully*, 874 F.2d 69 (2d Cir. 1989). One involved both RLUIPA and *Turner*, but respondents quote from only the *Turner* discussion. *Kuperman* v. *Wrenn*, 645 F.3d 69, 75, 79-80 (1st Cir. 2011). The RLUIPA claim in *Kuperman* was distinguishable as well; the inmate wanted not "to shave at all," *id.* at 71, and the court appeared unaware of rules in other states. The prisoner in the fourth case wanted entirely uncut beard and hair, *Ragland* v. *Angelone*, 420 F. Supp. 2d 507, 510 (W.D. Va. 2006), and prison officials described "numerous instances" of "specific security problems" prior to the policy, *id.* at 515. There was no suggestion that any incident involved anything so short as a half-inch beard. Similarly in the Alabama Brief (at 26-27), all the examples involve hair instead of beards, or hair *and* beards, and there is no claim that any of these were only half an inch.

Respondents also argue that alternative hiding places are irrelevant, because "prison officials are not put to the choice of either requiring prisoners to go naked or allowing beards." Resp. Br. 41. But that begs the question. The point of considering alternative hiding places (Pet. Br. 33-34) is that respondents have arbitrarily singled out religious practices for more stringent regulation than other activities presenting similar or greater risks. Respondents must demonstrate a compelling reason for the differential treatment — not just the fact that they value prisoners' shoes, socks, p ets, and hair but accord no value to religiously motivated beards. Respondents insist on absolutely zero risk with respect to religious beards — and only with respect to religious beards. Cf. *Fraternal Order of Police* v. *City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.) (exemption for medical beards but not religious beards indicates "a value judgment in favor of secular motivations").

Moreover, RLUIPA requires courts to focus on "the marginal interest in enforcing" a challenged policy, *Hobby Lobby*, 134 S. Ct. at 2779, and "the government does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown* v. *Entertainment Merchants Association*, 131 S. Ct. 2729, 2741 n.9 (2011). Given the many superior hiding places that respondents allow, they must show why prohibiting a half-inch beard significantly advances their interest in stopping contraband — which they have not done. Pet. Br. 33; U.S. Br. 24, 31.

3. Third, respondents argue that courts must allow "divergent assessments of risk" (at 42), even when prison officials reject the overwhelming consensus of prison systems across the country. Of course RLUIPA does not require uniformity across all prison systems.

But respondents must show that plausible alternatives would not work, and when more than forty other prisons have adopted a religious accommodation, that showing is all but impossible. Pet. Br. 21-32; U.S. Br. 19-20, 28-29; Wardens Br. 14-16. Here, respondents were not even aware of the policies in other prison systems, much less able to explain why they would not work. Pet. Br. 28-29.

4. Fourth, respondents claim that prison systems need not even consider less restrictive alternatives before rejecting them. Resp. Br. 42-43. But RLUIPA requires the government to "demonstrate[]" that it used the "least restrictive means." 42 U.S.C. § 2000cc–1(a). The government cannot meet this burden without considering alternatives. Just as a university must show that it seriously considered race-neutral alternatives before adopting a race-based admissions policy, *Fisher* v. *University of Texas*, 133 S. Ct. 2411, 2420 (2013), and a state must show "that it considered different methods that other jurisdictions have found effective" before restricting speech, *McCullen*, 134 S. Ct. at 2539, prisons must consider alternatives before they can satisfy strict scrutiny. Pet. Br. 44 (collecting cases); U.S. Br. 18-19; Wardens Br. 7-10.

C. Respondents' extra-textual limitations would gut the statute, eliminating every effective method by which courts might evaluate prison officials' testimony. If they need not even offer examples, if they can treat religion worse than other practices posing similar or greater risks and they need not explain why, if they can disregard accreditation standards and the overwhelming practice of other jurisdictions, if they need not even consider alternatives — *and* if judges must credit their testimony even when it appears "almost preposterous," Resp. Br. 30 — courts would have

no means whatever to evaluate their testimony.

Take, for example, Florida's current attempt to deny a kosher diet to Jewish inmates. *United States* v. *Secretary, Florida Dep't of Corrections*, No. 1:12-cv-22958, 2013 WL 6697786 (S.D. Fla. 2013). At least thirty-five states and the federal government offer kosher diets without security problems. *Id.* at *6. Florida itself offered a religious diet for three years without security problems. *Id.* at *1. And Florida offers "at least 15 medical and therapeutic diets at each facility" without security problems. *Id.* at *2.

But under respondents' theory, all it takes is one official to testify that kosher diets threaten security — that there might be "retaliation against inmates receiving Kosher meals," or that kosher meal trays could be "used to conceal contraband." Appellees' Br. 6-7, 13, *Rich* v. *Secretary, Florida Dep't of Corrections*, 716 F.3d 525 (11th Cir. 2013) (No. 12-11735) (brief filed Oct. 1, 2012). It would not matter if officials had no examples of security problems with kosher diets anywhere in the country; they could act prophylactically. Resp. Br. 36. It would not matter if they successfully managed fifteen different therapeutic diets; they could "address part of a problem." Resp. Br. 40. It would not matter if they had no idea that thirty-five states and the federal government provide kosher diets; they could make "divergent assessments of risk." Resp. Br. 42. And it would not matter if they refused to consider safer ways of providing kosher diets; actual consideration is an "extra-statutory administrative requirement." *Ibid.* Nor would it matter if they offered testimony that was "almost preposterous." Resp. Br. 30. Courts would have to take them at their word.

If that is what RLUIPA means, it is a dead letter.

II. Respondents Have Not Proved Either Compelling Interest or Least Restrictive Means.

Respondents concede that petitioner has shown a substantial burden on his religious exercise. Resp. Br. 43. The only issue is whether respondents have demonstrated compelling interest and least restrictive means. They have not come close.

A. Respondents Have No Compelling Interest in Prohibiting What At Least Forty-Three American Prison Systems Permit.

At least forty-three state and federal prison systems, several large municipal systems, and national accreditation standards would allow petitioner's beard. Pet. Br. 24-27.[2]

Respondents offer two arguments for ignoring their departure from the overwhelming norm. First, they say that "[p]etitioner does not offer any evidence regarding the 'experiences' of other prison systems." Resp. Br. 59. But it is a reasonable inference that if experience had been bad, these jurisdictions would have changed their policies. The briefs of Wardens and of Corrections Officials report favorable experience

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[2] We initially counted New Hampshire as number forty-four. Pet. Br. 25. This was mistaken; after a change of leadership, New Hampshire allows quarter-inch beards, and no more, for all inmates. N.H. Dep't of Corrections, Manual for the Guidance of Inmates § II.B.4.d (2011), http://www.nh.gov/nhdoc/divisions/publicinformation/documents/manual.pdf. We have also learned that Virginia permits uncut beards in one of its prisons, but the process of being transferred there is onerous. Virginia Department of Corrections, Operating Procedure: Offender Grooming and Hygiene, No. 864.1 § IV.I (2013), http://vadoc.virginia.gov/about/procedures/documents/800/864-1.pdf. Counting Virginia makes forty-four prison systems that would allow petitioner's beard; excluding Virginia leaves forty-three.

elsewhere. Most important, the burden is on respondents to explain why they cannot allow petitioner's beard when so many other prisons would. U.S. Br. 28-29.

Second, respondents argue that RLUIPA allows prison systems to make a "calculated decision not to absorb the added risks that its fellow institutions have chosen to tolerate." Resp. Br. 60. But respondents must demonstrate that these "added risks" are sufficiently substantial to create a compelling interest that cannot be served by any less restrictive means. U.S. Br. 28-31; Wardens Br. 14-16; Corrections Officials Br. 5-8. Respondents weren't even aware of the practices in other states, so there was no "calculated decision" to depart from national norms. They were uninformed not only about California and New York, Resp. Br. 59 n.15, but about every state. J.A. 119 (Harris not "aware of what other states are doing"); J.A. 105 (Lay didn't "know what goes on nationally across the country").

Respondents need not take discovery from other states. Alabama Br. 10. They can try "the common practice of picking up the phone to call other prisons," Wardens Br. 5, read literature from national prison bodies, *id.* at 11-12, consult accreditation standards, *id.* at 13, and attend continuing education programs, *id.* at 12, J.A. 101.

Respondents say in their statement of the case that their Cummins Unit is unusual in assigning even maximum security prisoners to work outside the fence. Resp. Br. 16-17. This is yet another example of respondents accepting much greater risks for nonreligious reasons than for religious exercise. In any event, petitioner is no longer at the Cummins Unit and

doesn't work outside the fence. See Pet. Br. 29-30. And whether inside the fence or out, respondents must show that a half-inch beard "would materially affect respondents' security situation." U.S. Br. 31; Pet. Br. 33. They have not done so. U.S. Br. 31-33; Pet. Br. 29-30, 33.

B. Respondents' Conclusory Testimony and Extra-Record Evidence Prove Neither Compelling Interest Nor Least Restrictive Means.

In the courts below, respondents relied on conclusory testimony that did not satisfy strict scrutiny. Pet. Br. 32-43. Recognizing that fact, they now seek to supplement the record with new interests and new evidence never presented below. *E.g.*, Resp. Br. 47-48 (identification within prison); Resp. Br. 14, 25, 51, 54 (contraband "hidden inside the mouth"). Either way, they have not met their burden.

1. Respondents' testimony in *Jones* v. *Meinzer*.

Seeking new evidence, respondents repeatedly cite their own testimony and affidavits, and the magistrate's summary of that testimony, in *Jones* v. *Meinzer*, No. 5:12-cv-00117, 2013 WL 5676886, *recommendation rejected*, 2013 WL 5676801 (E.D. Ark. 2013). Resp. Br. 14, 46, 50-51, 54-55, 61-62. But their argument and sworn testimony in *Jones* contradict their argument and sworn testimony here.

Here, respondents claim that quarter-inch and half-inch beards are significantly different, so that the medical exception for quarter-inch beards does not undermine their reasons for banning petitioner's half-inch beard. Resp. Br. 20, 25-26, 49-52, 58; J.A. 124-125 (Harris). But *Jones* involved a *religious* request for a

quarter-inch beard. 2013 WL 5676801 at *1; Transcript of Hearing, *Jones* v. *Meinzer*, DE 91 at 5 ("*Jones* Tr."). And there, respondents claimed that a quarter-inch beard posed all the same problems as longer beards. *Jones* Tr. 11-17, 22, 28, 48 (Harris); *id.* at 88 (Hobbs); *id.* at 42 (counsel).

So quarter-inch beards are dangerous in *Jones*, but safe in *Holt*. Such inconsistent testimony cannot prove a compelling interest. It shows only that respondents reflexively oppose religious exemptions and testify to whatever supports that opposition. Pet. Br. 41, 42-43.

2. Hiding contraband.

a. Respondents claim that prisoners can hide contraband in a half-inch beard. But they offered no record evidence of any prisoner ever hiding contraband in any beard of any length. They admit that inmates have many other hiding places, Resp. Br. 41, and those hiding places are clearly better, Pet. Br. 34-35. As the Wardens Brief explains (at 16), "the last place an inmate would choose to hide contraband is in a half-inch beard."

Respondents summarize the testimony of Lay and Harris, listing small items that "could be concealed" in a half-inch beard. Resp. Br. 46. But Lay and Harris began working for respondents in 1975 and 1979, respectively (J.A. 110, 113), and Arkansas did not restrict beards until it adopted "a new grooming policy" in 1998. Resp. Br. 8; *Jones* Tr. 75 ("beards allowed up until 1998"). Thus, Lay and Harris had a combined 42 years of experience in a system with unrestricted beards, but offered no example of anything ever hidden in a beard.

Respondents cite their *Jones* testimony that a short beard might conceal contraband hidden inside an inmate's mouth. Resp. Br. 14, 54. But Lay and Harris thought so little of this possibility that they never mentioned it in this case. And they offered no example of it ever happening in either case.

Most dramatically, respondents claim that in 2013, "an inmate with a beard arrived from a county jail," "concealed a razor blade in his beard," and "used it to commit suicide later that evening." Resp. Br. 46 (citing *Jones* Tr. 78-79 (testimony of Director Hobbs)). But if the razor blade was not discovered until the inmate was dead, how would respondents know where he had hidden it?

The truth is different. The Department's spokesman was quoted saying that the inmate "had the razor blade *because he had been given it to shave.*" Christina Huynh, *Inmate found dead at Malvern prison*, ArkansasOnline, Aug. 9, 2013, http://www.arkansasonline.com/news/2013/aug/09/inmate-found-dead-malvern-prison/ (emphasis added). That account is confirmed by contemporaneous police reports, photographs of the razor, and a declaration from the coroner. (We have asked permission to lodge this documentation under Rule 32.3.) The inmate committed suicide with an orange Bic razor issued by the prison and too large and brightly colored to be hidden in a beard. This clearly false testimony, presumably based on rumor or misinformation received from subordinates, highlights the danger of abject judicial deference.

The fact that respondents issue razors to prisoners also undermines their claims. See Coroner's Declaration ¶ 4; Arkansas Department of Correction, *Inmate*

Handbook 7 (2013), http://adc.arkansas.gov/resources/Documents/inmate_handbook.pdf (prisoners "are issued personal hygiene items" and may buy "additional grooming items from the commissary"); *Jones* Tr. 14 (describing another incident where an inmate "had broken his safety razor"). Respondents cannot issue thousands of razors to prisoners and then claim to fear that part of a razor blade might be smuggled into the prison in a half-inch beard.

b. Even assuming a half-inch beard could conceal contraband, respondents fail to demonstrate that a complete ban is the least restrictive means. Respondents can search the beard, require inmates to run their hands through their beards, or require inmates to shave if contraband is ever found in their beard — most of which respondents do for inmates' hair, and all of which other prisons do for beards. Pet. Br. 37-38.

Respondents claim that searching beards "would pose legitimate safety concerns," because an officer "could get cut or pricked with dirty needles or broken razorblades." Resp. Br. 55. But the same is true of searching hair. U.S. Br. 24. Respondents also claim that "putting hands around a person's mouth is particularly invasive," which could lead to "an altercation" or "bit[ing]." Resp. Br. 55. But it is no more invasive than respondents' strip searches or visual body-cavity searches. See *Jones* Tr. 30 ("[W]hen we shakedown, we run our hands, with gloves on, through inmates' hair when we're doing a strip search, and we do check their facial hair, and we do ask them to bend over and cough and squat.").

Respondents claim that requiring an inmate to vigorously run his own hands over the entire area of a half-inch beard "is not a realistic solution," because the

inmate could "manipulate the self-search in ways that avoid detection." Resp. Br. 55-56. But how? The only authority respondents cite involved long, uncut hair. *Ibid.* (citing *Limbaugh* v. *Thompson*, No. 2:93-cv-1404, 2011 WL 7477105 at *7 (M.D. Ala. 2011)). A half-inch beard has much less hair to search. See Wardens Br. 16-17 (self-search is used "often" and is effective even for longer beards).[3]

Respondents ignore the alternative of requiring an inmate to shave if contraband is ever found in his beard. Pet. Br. 37-38. This is a significant deterrent. It is what respondents already do for contraband hidden in the hair. Ark. Admin. Code 004.00.1-I(C)(6). And respondents don't even attempt to explain why it works for hair but not beards.

Finally, respondents say nothing about the real question, which is whether half-inch beards significantly increase the risk of contraband. Given all the other places for hiding anything that might conceivably be hidden in a half-inch beard, respondents have offered no reason to believe that the flow of contraband would increase in the slightest. Pet. Br. 33-34.

3. Changing appearance.

Respondents also argue that banning petitioner's half-inch beard furthers a compelling interest in prisoner identification. Resp. Br. 47-49. Respondents relied below on the risk that an inmate might change his appearance by shaving his beard *after an escape*. J.A. 80, 96.

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[3] It is not true that petitioner raised self-search "for the first time in this Court." Resp. Br. 55. He raised it in the district court, DE 86 ¶ 12, and in his Eighth Circuit brief at 7 (filed Oct. 25, 2012).

Respondents now seek to supplement the record in two ways. First, they try to bolster the evidence on identification *after an escape* by offering five newspaper articles from the last thirty years. Resp. Br. 48 n.14. Second, they seek to introduce a new interest never raised below — identifying inmates *within the prison* in order to prevent escape or other harms — by citing five more newspaper articles from the last twenty years. Resp. Br. 47 n.13.

Respondents cannot meet their burden by conducting Westlaw searches of old newspaper articles after certiorari is granted. The new arguments are waived, and they only underscore respondents' failure to satisfy strict scrutiny on the record.

The new arguments and news stories also fail on the merits. First, respondents' alleged interest in identification is severely undermined by the exception for quarter-inch medical beards. Pet. Br. 40 (citing *Newark*). Respondents claim that medical beards are "a rare exception," Resp. Br. 25, 51, but elsewhere they admitted that 5-6% of all inmates (*i.e.*, 750 to 900 inmates) have medical beards. *Jones* Tr. 35-36. And they testified that quarter-inch medical beards present the same problem of "changing the appearance." *Jones* Tr. 28. If the interest in identification is not compelling with respect to medical beards, it is not compelling with respect to petitioner's half-inch beard. U.S. Br. 25; Wardens Br. 21.

Second, respondents cannot show that they used the least restrictive means. Respondents already require a new photograph whenever "the growth or elimination of hair, mustaches, sideburns and/or beard significantly changes your [an inmate's] appearance." Pet. Br. 39 (quoting Ark. Admin. Code 004.00.1-

I(C)(6)). Many other prison systems have the same policy. *Ibid.*; Wardens Br. 19-21. Digital cameras make it "easy and inexpensive" to maintain multiple photos. Wardens Br. 20. Obtaining both a bearded and clean-shaven photo actually furthers respondents' interest in capturing escaped prisoners, because it thwarts attempts to change appearance by either shaving or growing a beard. See J.A. 104-105 (prisoner grew beard after escape); U.S. Br. 25.

Respondents argue that their rephotography policy provides only "limited help" in identifying inmates who "quickly and momentarily" change their appearance in prison, and that an inmate "could refuse to shave his beard upon entry into ADC." Resp. Br. 56-57. But respondents rely on this policy for inmates who "quickly and momentarily" change their appearance by shaving mustaches, sideburns, medical beards, or hair. And Virginia requires a clean-shaven photograph of any prisoner who grows a beard. Pet. Br. 40 n.11. Whether there is compelling need to require new inmates to shave for one photograph is not a question presented here. But such a rule is less restrictive than requiring inmates to remain clean-shaven forever. U.S. Br. 25-26.

4. Measuring half an inch.

Respondents have abandoned their claim that 15,000 inmates will seek beards, Pet. Br. 40-41, arguing instead that "hundreds or thousands" will do so. Resp. Br. 62. But we now know that hundreds of inmates have medical beards. See p. 17, *supra*.

Respondents also assert that "it is not easy to determine visually whether a beard has grown longer than half an inch." Resp. Br. 58. But respondents do

not "determine visually" whether inmates are complying with the quarter-inch medical limit. Rather, they require inmates to shave with clippers "[a]t a minimum once a week, if not twice." *Jones* Tr. 22-23. It would be a "simple solution" to require regular clipper shaves of religious beards. *Jones* Tr. 86; U.S. Br. 28. And if it is so hard to monitor the precise length of beards, respondents could impose qualitative limits rather than length limits, as other prisons do. Pet. Br. 42.

Respondents also claim that allowing half-inch beards would "greatly increase the time and expense of running the prison system." Resp. Br. 58-59. But there is no reason to think the "time and expense" would be any different from that of administering medical beards. The two cases respondents cite (at 58-59) involved "unshorn hair," *Limbaugh*, 2011 WL 7477105 at *4, or the deferential *Turner* standard, *Green* v. *Polunsky*, 229 F.3d 486, 489-490 (5th Cir. 2000).

Nor have respondents demonstrated that a complete ban on religious beards is the least restrictive means of handling supposed administrative problems. A clipper guard, a sketch, a ruler, or even a marked popsicle stick would all be less restrictive means of achieving respondents' purported interest in precise beard length. Pet. Br. 41-42.

5. No exceptions ever.

Respondents argued below that accommodating petitioner's religious exercise could endanger prison security by making petitioner a "target" or enabling him to become a "leader." Pet. Br. 42-43 (citing J.A. 86-87, 118-119). They abandon that argument here, although

their amici try to revive it, Alabama Br. 20, and respondents still claim a "compelling interest in uniform enforcement." Resp. Br. 62. Neither brief responds to the point that if preventing exceptions is in itself a compelling interest, then RLUIPA is a dead letter. Pet. Br. 43; U.S. Br. 27; Wardens Br. 23-24.

6. Failure to consider less restrictive means.

Respondents also failed to consider whether less restrictive means were available. Pet. Br. 43-46. They first claim that they are not required to "consider-and-reject" less restrictive alternatives. Resp. Br. 42-43 (citing *Knight* v. *Thompson*, 723 F.3d 1275, 1286 (11th Cir. 2013), *cert. pending*, No. 13-955; *Fegans* v. *Norris*, 537 F.3d 897, 907 (8th Cir. 2008); *Wos* v. *E.M.A.*, 133 S. Ct. 1391, 1409 (2013) (Roberts, C.J., dissenting)). But two of these cases are on the wrong side of a lopsided circuit split, and the other is a dissent in a Medicaid preemption case, arguing that the state bore no burden of proof. This Court and at least six circuits hold that prisons must consider less restrictive alternatives. See Pet. Br. 43-44 (collecting cases; discussing *Turner*); U.S. Br. 18-19; Wardens Br. 8; *Jova* v. *Smith*, 582 F.3d 410, 416 (2d Cir. 2009).

Respondents do not claim that they considered alternatives. Their reaction to all prisoner claims has been fierce opposition, not good-faith consideration. Even now they offer no response to several proposed less restrictive means. Pet. Br. 45.

Respondents also claim that petitioner's proposed alternatives are irrelevant, because "[a] proposed alternative rule constitutes a less restrictive alternative *only if* it would be equally as effective in achieving the

compelling governmental interest." Resp. Br. 52 (emphasis added). But respondents' cases do not treat equal effectiveness as a *necessary* element of a valid less restrictive alternative; they treat it as *sufficient*. Compare, *e.g.*, *Reno* v. *ACLU*, 521 U.S. 844, 874 (1997) (burden on speech "unacceptable *if* less restrictive alternatives would be at least as effective") (emphasis added) with Resp. Br. 52 ("only if" and "must be"). In any event, the burden is not on the prisoner to prove that the alternatives are equally effective; it is on "the Government, presented with a plausible, less restrictive alternative, to prove the alternative to be ineffective." *United States* v. *Playboy Entertainment Group, Inc.*, 529 U.S. 803, 823 (2000). Respondents have not carried that burden.

Nor is it enough to show that a less restrictive means "may be inconvenient, or may not go perfectly every time." *Id.* at 824. Even under rational basis review, the government may be required to adopt alternatives that impose "*de minimis* cost" — not *zero* cost — on prison security. *Turner*, 482 U.S. at 91, 98. Strict scrutiny requires more. *Brown*, 131 S. Ct. at 2741 n.9 (government does not have "compelling interest in each marginal percentage point by which its goals are advanced").

C. Enforcing RLUIPA According to Its Terms Will Not Wreak Havoc on Prison Administration.

Respondents argue that if RLUIPA is enforced according to its terms, terrible results will follow. They offer two variations on this slippery-slope argument.

1. The first is an extended *ad hominem*, in which respondents attack prisoners generally and petitioner specifically. They start with a press report of a prison

murder committed with "a 6-inch metal shank" (according to the cited source, Resp. Br. 1 n.1), which obviously wasn't hidden in a half-inch beard. And they recount petitioner's crimes, both proven and alleged. Resp. Br. 1-2, 9-12.

But Congress knew that many prisoners had been convicted of violent crimes. If RLUIPA cannot be faithfully enforced in prisons, it is *de facto* repealed. Nor do respondents ban beards only for petitioner. They ban all religious beards, and the ruling in this case will affect all prisoners whose religious practices are restricted, often in "egregious and unnecessary" ways. Joint Statement, 146 Cong. Rec. at 16699.

2. The second half of respondents' argument is that faithfully applying RLUIPA will unleash "thousands" of claims. Resp. Br. 4. Prisons will have to let inmates have "functional knives," engage in "sparring," or worse. Resp. Br. 5-6.

These horribles fall apart upon inspection. The violent character of many prisoners can of course be relevant to RLUIPA's balancing test. Where a risk is real and substantial, proof will often be easy. Thus, respondents' example of a Sikh kirpan (at 5) is an easy case. No prison in the country allows kirpans, and the danger of allowing substantial metal blades in prisons is obvious. The safeguards that suffice for schoolchildren (dull blade, sewn in sheath) do not suffice for convicted prisoners with time on their hands.

Nor does RLUIPA mandate Tulukeesh sparring. Resp. Br. 5-6. As the Second Circuit explained, "the obvious security implications of allowing inmates to practice potentially violent physical activities render the prohibition of such activities the least restrictive means of ensuring institutional safety." *Jova*, 582 F.3d

at 416-417. Prisoners who hone their fighting skills may use those skills outside the gym, or use them too aggressively inside the gym.

Respondents' worries about Hindu yoga performed "in a vulnerable position," Resp. Br. 5, may present an easy case the other way. The plaintiff in that case alleges that Muslims are permitted to pray five times daily near cellmates in a similarly vulnerable position. Complaint ¶ 32, *Bargo* v. *Kelley*, No. 5:14-cv-00078 (E.D. Ark. 2014). If respondents are discriminating between faiths, a compelling justification is hard to show.

These three cases thus illustrate Congress's finding that "the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(a)(5). And this Court has affirmed "the feasibility of case-by-case consideration of religious exemptions" under RFRA and RLUIPA. *O Centro*, 546 U.S. at 436 (characterizing *Cutter*). "Nothing in our [*Cutter*] opinion suggested that courts were not up to the task." *Ibid.* The task is not difficult here.

CONCLUSION

The judgment should be reversed.

Respectfully submitted.

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AUGUST 22, 2014

SUPPLEMENTAL BRIEF

No. 13-6827

In the Supreme Court of the United States

GREGORY HOUSTON HOLT
A/K/A ABDUL MAALIK MUHAMMAD,
PETITIONER

v.

RAY HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, *ET AL.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF

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Supreme Court Rule 15.8 1

PETITIONER'S SUPPLEMENTAL BRIEF

1. Petitioner Gregory Holt, a/k/a/ Abdul Maalik Muhammad, respectfully submits this supplemental brief pursuant to Supreme Court Rule 15.8 to inform the Court of new matter bearing on his pending petition for a writ of certiorari. Filed *pro se* and *in forma pauperis* on September 27, 2013, the petition correctly identifies a circuit split over the proper interpretation of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.* ("RLUIPA").

There have been two new developments since the petition was filed. First, petitioner is now represented by counsel. Petitioner has retained Professor Douglas Laycock of the University of Virginia to represent him, and Professor Laycock has accepted the representation.

Second, the Eleventh Circuit has denied *en banc* rehearing in *Knight v. Thompson*, 723 F.3d 1275 (11th Cir. 2013), *en banc rehearing denied* (Nov. 8, 2013) (No. 12-11926), further solidifying the circuit split described in the petition in this case.

The circuits disagree about how to apply RLUIPA's compelling-interest standard to prison regulations. This is the most fundamental question about the meaning of RLUIPA's provisions on institutionalized persons, and the disagreement among the circuits extends to all applications of these provisions.

More specifically, circuits are split over whether a prison system must actually consider less restrictive measures before rejecting them, see Pet. 6-7, 10, and whether a prison system must demonstrate that it cannot grant religious accommodations that other prison systems have successfully granted or that other prison systems have

allowed to all prisoners. See Pet. 7-9.

2. The Eleventh Circuit acknowledged that "some of our sister courts" hold that, under RLUIPA, "prison administrators must show that they 'actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice.'" *Knight*, 723 F.3d at 1285 (quoting *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005), and citing *Spratt v. Rhode Island Department of Corrections*, 482 F.3d 33, 41 (1st Cir. 2007), and *Washington v. Klem*, 497 F.3d 272, 284 (3d Cir. 2007)); see also *Jova v. Smith*, 582 F.3d 410, 416 (2d Cir. 2009) (following *Warsoldier* and *Washington* on this issue); *Couch v. Jabe*, 679 F.3d 197, 203 (4th Cir. 2012) (state must "acknowledge and give some consideration to less restrictive alternatives")). Nevertheless, the Eleventh Circuit held that the "more strict proof requirement" of these other Circuits is "not the law in this circuit." *Knight*, 723 F.3d at 1285-86.

3. The Eleventh Circuit also rejected any requirement that the government must demonstrate why it cannot adopt religious accommodations that other prison systems have successfully implemented. "[T]he policies of other jurisdictions," the court held, "are not controlling;" rather, the government can make "a calculated decision not to absorb the added risks that its fellow institutions have chosen to tolerate." *Id.* at 1286. But see *Warsoldier*, 418 F.3d at 999 (government failed strict scrutiny where "[p]risons run by the federal government, Oregon, Colorado, and Nevada all meet the same penological goals without such a policy"); *Spratt*, 482 F.3d at 42 (government failed strict scrutiny "in the absence of any explanation . . . of significant differences" between defendant's prison and federal prisons with less restrictive policies);

Washington, 497 F.3d at 285 (government failed strict scrutiny where its "other institutions" made the requested accommodation); *Garner v. Kennedy*, 713 F.3d 237, 247 (5th Cir. 2013) (finding it "persuasive that prison systems that are comparable in size to Texas's—California and the Federal Bureau of Prisons—allow their inmates to grow beards, and there is no evidence of any specific incidents affecting prison safety in those systems due to beards").

The Eleventh Circuit has now refused en banc review to consider its explicit disagreement with the other circuits on each of these issues.

4. Somewhat less crisply formulated is an underlying circuit split over whether prison officials in RLUIPA cases actually have to "demonstrate" anything. The statute requires defendants to "demonstrate[]" compelling interest and least restrictive means—to meet "the burdens of going forward with the evidence and of persuasion" on these issues. 42 U.S.C. §§ 2000cc-1, 2000cc-5(2) (2006). But the Eighth Circuit effectively puts the burden of persuasion on plaintiffs, requiring "substantial evidence in record indicating that response of prison officials to security concerns is exaggerated." *Holt v. Hobbs*, 509 F App'x 561, 562 (8th Cir. 2013) (citing *Fegans v. Norris*, 537 F.3d 897, 903 (8th Cir. 2008)).

Other circuits give reasonable deference to prison officials' expertise without abdicating the judicial role or effectively negating the statute. Prison officials must explain their judgments in terms that are not conclusory, speculative, or implausible. Thus the Fourth Circuit says that "a court should not rubber stamp or mechanically accept the judgments of prison administrators." *Couch*, 679 F.3d at 201 (quoting

Lovelace v. Lee, 472 F.3d 174, 190 (4th Cir. 2006)). The First Circuit says that "We do not think that an affidavit that contains only conclusory statements about the need to protect inmate security is sufficient to meet [defendant's] burden under RLUIPA." *Spratt*, 482 F.3d at 40 n.10. The Fifth Circuit says that "speculative testimony" is not enough. *Garner*, 713 F.3d at 246.

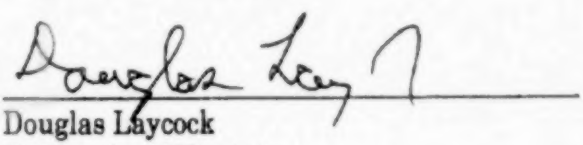
5. The Eighth Circuit's brief opinion in this case took the most deferential position on each of these issues. The court summarized defendants' testimony in wholly conclusory terms. 509 F. App'x at 562. The court did not require respondents to actually consider alternatives suggested by petitioner, or to explain why they had not considered or adopted those alternatives. The court rejected evidence that other institutions "have been able to meet their security needs while allowing inmates to maintain facial hair," because that evidence "does not outweigh deference owed to expert judgment of prison officials who are more familiar with their own institutions." *Ibid.* The court did not require respondents to explain how their prison was different from these other prisons. The court did not assess respondents' evidence with attention to the difference between its *Fegans* precedent, in which the prisoner wanted to grow his hair and beard apparently without limit, 537 F.3d at 900, and this case, in which petitioner seeks to grow only a half-inch beard.

6. In sum, the Eleventh Circuit's denial of *en banc* rehearing in *Knight* solidifies a widespread and acknowledged circuit split over RLUIPA's meaning and over its application to prison grooming policies and to beards in particular. Compare the decision below (upholding ban on even a half-inch beard under RLUIPA), and

Muhammad v. Sapp, 494 F. App'x 953 (11th Cir. 2012) (upholding no-beard rule under RLUIPA), with *Garner*, 713 F.3d at 244-48 (striking down no-beard rule under RLUIPA), and *Couch*, 679 F.3d at 201-04 (reversing summary judgment that had upheld no-beard rule under RLUIPA).

The Court should grant the petition in this case to resolve that disagreement. Granting certiorari on Questions I and II as stated in the petition would fairly include all the subsidiary questions on which the circuits are split. Questions III and IV present the parallel First Amendment issues. Question V restates the circuit split. Question VI explicitly presents the least-restrictive-means question that is also fairly included in Questions I and II.

Respectfully submitted,



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January 3, 2014

No. 13-6827

In the Supreme Court of the United States

GREGORY HOUSTON HOLT
A/K/A ABDUL MAALIK MUHAMMAD,
PETITIONER

v.

RAY HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, *ET AL.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CERTIFICATE OF SERVICE

I, Douglas Laycock, a member of the bar of this Court, certify under penalties of perjury that I served Petitioner's Supplemental Brief on counsel for respondents by e-mail to christine.cryer@arkansasag.gov and by first-class mail to:

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January 3, 2014

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January 3, 2014

Mr. Christopher Vasil
Chief Deputy Clerk
Supreme Court of the United States
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Washington, DC 20543

RE: Holt v. Hobbs, No. 13-6827

Dear Mr. Vasil:

I enclose for filing an original and ten copies of Petitioner's Supplemental Brief in the captioned case, and a Certificate of Service.

The petition in this case was filed pro se and in forma pauperis, but as I advised you on January 2, I am now representing petitioner.

Very truly yours,

Douglas Laycock

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RE: Holt v. Hobbs, No. 13-6827

Dear Mr. Vasil,

I have been retained to represent Mr. Gregory Houston Holt, a/k/a Abdul Maalik Muhammad, in No. 13-6827.

I will be filing a short supplemental brief, which will formally enter my appearance as counsel of record, probably on January 3.

Very truly yours,

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AMICUS CURIAE BRIEF

No. 13-6827

In the Supreme Court of the United States

GREGORY HOUSTON HOLT, AKA ABDUL MAALIK MUHAMMAD, PETITIONER

v.

RAY HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether the Arkansas Department of Correction's grooming policy violates the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc *et seq.*, by prohibiting petitioner from growing a one-half-inch beard in accordance with his religious beliefs.

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In the Supreme Court of the United States

No. 13-6827

GREGORY HOUSTON HOLT, AKA ABDUL MAALIK MUHAMMAD, PETITIONER

v.

RAY HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents an important question about the scope of protection afforded to prison inmates' religious exercise by the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq.* The United States has a substantial interest in the resolution of that question. Both private plaintiffs and the Attorney General may bring actions under RLUIPA for declaratory and injunctive relief, 42 U.S.C. 2000cc-2(f), and the United States has participated in RLUIPA cases in district courts and courts of appeals involving challenges to prison grooming rules. In addition, the Federal Bureau of

Prisons (BOP) is subject to the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, which imposes the same substantive standard on federal prisons that RLUIPA imposes on state and local prisons.

STATEMENT

1. Congress enacted RLUIPA to provide statutory protection against religious discrimination and unjustified infringement of the free exercise of religion by state and local governmental entities. The statute applies to two specific contexts: land use regulation and institutionalization. The provision principally at issue in this case is Section 3(a) of RLUIPA, which provides:

> (a) General rule
>
> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in [42 U.S.C. 1997], even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. 2000cc-1(a). Section 4(b) of RLUIPA specifies that a "plaintiff shall bear the burden of persuasion on whether" a challenged law "substantially burdens the plaintiff's exercise of religion." 42 U.S.C. 2000cc-2(b). Section 8(2), in turn, makes clear that the government defendant bears the burdens of proof and

persuasion on whether the substantial burden imposed "is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. 2000cc-5(2) (defining "demonstrates" to mean "meets the burdens of going forward with the evidence and of persuasion").

RLUIPA "protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion." *Cutter* v. *Wilkinson*, 544 U.S. 709, 721 (2005). Congress enacted RLUIPA in part to address "'frivolous or arbitrary' barriers" that have "impeded institutionalized persons' religious exercise." *Id.* at 716 (quoting *Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000*, 146 Cong. Rec. 16,699 (2000) (*Joint Statement*)). And, as this Court noted in *Cutter*, Congress "anticipated that courts" entertaining complaints under Section 3 of RLUIPA "would apply the Act's standard with 'due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.'" *Id.* at 723 (quoting *Joint Statement*, 146 Cong. Rec. at 16,699); see *id.* at 717.

2. Petitioner describes himself as a "devout fundamentalist Muslim" who holds as a tenet of his faith that he must grow and maintain a beard. J.A. 18. Petitioner is incarcerated in an Arkansas state prison. J.A. 17. The Arkansas Department of Correction has a policy that prohibits inmates from wearing beards of any length, except that inmates with dermatological

conditions may be permitted to wear quarter-inch beards. J.A. 17, 118, 164. The stated reason for the no-beard policy is "to provide for the health and hygiene of incarcerated offenders, and to maintain a standard appearance throughout the period of incarceration, minimizing opportunities for disguise and for transport of contraband and weapons." J.A. 164. When an inmate does not comply with the no-beard policy, he is subject to disciplinary action and disciplinary consequences may be assessed cumulatively if an inmate persists in refusing to shave. J.A. 18, 23-24, 164.

Petitioner alleges that he has been subject to multiple disciplinary actions for refusing to shave his half-inch beard. J.A. 18, 55. In May 2011, petitioner filed a prison grievance seeking permission to wear a half-inch beard in observance of his faith. See J.A. 20, 25. Prison officials denied petitioner's request and subsequently denied his appeal of that decision. J.A. 25, 164.

3. a. Petitioner filed a pro se complaint in federal district court and sought a preliminary injunction preventing respondents from enforcing the grooming policy against him to the extent he sought to wear a half-inch beard. J.A. 16-22, 29, 162-163. The district court entered a preliminary injunction and temporary restraining order based on its conclusion that respondents had "not met their 'burden of demonstrating that the grooming policy is the least restrictive means to achieve security as *applied* to'" petitioner. J.A. 34 (quoting *Fegans* v. *Norris*, 537 F.3d 897, 908-909 (8th Cir. 2008)).

On remand from the district court, a magistrate judge held a hearing at which both petitioner and

representatives from the State testified. See J.A. 35, 48-159.

Petitioner testified about his religious beliefs and about his experience with respondents' grooming policy. J.A. 54-58. He testified that his administrative grievance was denied on the ground that inmates could hide contraband in beards even if the beards were limited to a half inch in length. J.A. 56. In response to that concern, petitioner testified that inmates commonly transport weapons and contraband in the hair on their head, which can be longer than a half-inch on top if it does not reach past the middle of the nape of the neck. *Ibid.* Petitioner further testified that he did not understand why a half-inch beard would pose a security threat but a quarter-inch beard (which respondents permit for inmates with dermatological conditions) would not. J.A. 57. In response to respondents' concern that permitting beards in prison would enable an escaping inmate to quickly change his appearance, petitioner pointed out that respondents could take both clean-shaven and bearded photos of an inmate to use for identification purposes, as the New York Department of Corrections does. J.A. 69. With respect to respondents' concern that petitioner would be targeted by other inmates, petitioner testified that he had not experienced any problems at the prison in the nearly three months he had been allowed by the preliminary injunction to grow his beard to a half inch in length. J.A. 57-58, 65. Petitioner also testified that, according to his research, prisons in other states (such as New York and California) permit inmates to grow beards. J.A. 55-56, 69.

On behalf of respondents, Warden Gaylon Lay testified that allowing some inmates to grow beards

would present security problems because inmates would be able to hide contraband in the beard, would be able to change their appearance upon escape by shaving, and might become a target of other inmates by virtue of receiving special treatment. J.A. 79-80, 84-87. Warden Lay also testified that a half-inch-beard rule would be difficult for the prison to administer because it would be difficult to measure an inmate's beard length on a consistent basis. J.A. 80. On cross-examination, Warden Lay conceded that inmates currently hide contraband in a number of places, including their clothing. J.A. 98. Warden Lay acknowledged that other major prison systems permit inmates to grow beards. J.A. 101. He admitted that he did not know why those prisons had adopted that policy and explained that he believed many of those prisons are different from the Cummins facility (where petitioner is housed) because Cummins uses open barracks (rather than cell-block) housing and operates an agricultural program that permits inmates to travel beyond the prison's walls. J.A. 101-102. He testified that he did not know whether other prisons that allow beards have had problems with escaping inmates' changing their appearance and stated that, if the prison was not allowed to order an inmate to shave at all, it could not take a photo of him clean-shaven. J.A. 104-106.

Assistant Director Grant Harris also testified on behalf of respondents. He testified that an inmate might be able to conceal a cell-phone SIM card (or subscriber identity module) in a half-inch beard—which could then be used in a cell phone to facilitate drug trafficking in a prison. J.A. 114-117. He further

testified that he was not aware of grooming policies employed by other States. J.A. 119.

b. The magistrate issued an oral ruling, which was later followed by written findings that were ultimately adopted by the district court. J.A. 153-181.

The magistrate explained orally that he would deny petitioner's request for an injunction because he did not believe petitioner was likely to prevail on the merits of his claims. J.A. 153-159. The magistrate relied on the Eighth Circuit's decision in *Fegans* v. *Norris*, *supra*, which rejected an inmate's request under RLUIPA to grow a long beard and long hair. J.A. 154-157. The magistrate conceded that, "looking at [petitioner] and [his] beard, * * * it's almost preposterous to think that [he] could hide contraband in [the] beard." J.A. 155. But the magistrate felt compelled by *Fegans* to defer to respondents' proffered penological justifications for refusing petitioner's request to grow a half-inch beard regardless of whether the concerns driving those justifications had ever "actually materialized." J.A. 154-155; see J.A. 156 ("*Fegans* * * * tells me exactly what I have to do in this case.").

In his written findings, the magistrate reiterated that he would not issue an injunction both because the balance of harms favored respondents and because petitioner was not likely to succeed on the merits. J.A. 162-169. He further recommended that the district court dismiss petitioner's complaint under the Prison Litigation Reform Act of 1995 (PLRA), 28 U.S.C. 1915(e)(2)(B), 1915A(a), which requires dismissal of a prisoner complaint that fails to state a claim on which relief may be granted. J.A. 169-178. The magistrate recommended rejecting petitioner's con-

tention that respondents' grooming policy is not the least restrictive means of furthering their legitimate penological interests. J.A. 175-177. The magistrate distinguished respondents' allowance of a quarter-inch beard for inmates with dermatological conditions because petitioner seeks to grow a beard that is longer. J.A. 175-176. The magistrate also accepted respondents' justification for not adopting a practice used by New York whereby a prison photographs inmates with and without facial hair to facilitate identification. J.A. 176. Finally, the magistrate concluded that respondents' grooming policy does not substantially burden petitioner's religious practice because respondents permit him to possess a prayer rug and list of distributors of Islamic materials, to maintain his religiously mandated diet, to correspond with a religious advisor, and to observe religious holidays. J.A. 176-177.

The district court adopted the magistrate's written findings and recommendations and dismissed petitioner's complaint. J.A. 179-182. The district court entered a stay of its order pending appeal. J.A. 183.

4. The Eighth Circuit affirmed in an unpublished opinion. J.A. 184-187. The court of appeals agreed with the district court that respondents "met their burden under RLUIPA of establishing that [their] grooming policy was the least restrictive means of furthering a compelling penological interest." J.A. 186 (citing *Fegans*, 537 F.3d at 903). The court relied on its previous statement in *Fegans* that, although prison policies from other jurisdictions are relevant to determining whether less restrictive means might further a defendant's penological interests, evidence of such policies does not outweigh the deference owed

to the judgment of prison officials about what is appropriate for a particular institution. J.A. 186-187 (citing *Fegans*, 537 F.3d at 905). The court of appeals denied petitioner's motion for a stay. J.A. 191.

5. Petitioner sought review and injunctive relief in this Court. The Court granted petitioner's motion for an injunction pending disposition of petitioner's petition for a writ of certiorari, enjoining respondents from enforcing their grooming policy "to the extent that it prohibits [petitioner] from growing a one-half-inch beard in accordance which his religious beliefs" until the Court either denied the petition for a writ of certiorari or rendered judgment. J.A. 192. A grant of certiorari followed. J.A. 193-194.

SUMMARY OF ARGUMENT

A. When a prison imposes a substantial burden on an inmate's religious exercise, RLUIPA requires the prison to establish that imposing the burden is the least restrictive means of furthering a compelling governmental interest. A prison cannot meet that burden by merely stating that the challenged regulation or practice furthers the prison's interest in security. Every prison has a compelling interest in maintaining proper security, but not every restriction on an inmate's religious exercise meaningfully advances that interest. When Congress enacted RLUIPA, it made clear that courts should accord deference to prison administrators' considered judgments about how to run safe and efficient prisons. Congress also made clear, however, that such deference is not due when a prison justifies a restriction based on exaggerated fears or mere speculation. RLUIPA assigns to the defendant "the burdens of going forward with the evidence and of persuasion" on whether a challenged

practice "is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. 2000cc-1(a), 2000cc-5(2).

A RLUIPA defendant need not think up and shoot down every conceivable alternative means of furthering its compelling interests. But a defendant must demonstrate why any less restrictive alternative that is identified in the administrative grievance process would not adequately advance its compelling interests in the particular case. When the record reveals that other prisons or prison systems regularly employ less restrictive means of furthering their compelling interests, moreover, a defendant must explain why those less restrictive alternatives would not adequately further the government's interests with respect to the particular plaintiff at issue. And when a prison provides an exception to a general rule for secular reasons (or for only certain religious reasons), the prison must explain why extending a comparable exception to a specific plaintiff for religious reasons would undermine its compelling interests.

B. The district court and court of appeals erred in concluding that respondents carried their burden in this case. Respondents have contended that their no-beard grooming policy is necessary to further their compelling interest in security. Prison security is a compelling government interest—but respondents did not demonstrate that refusing to allow petitioner to grow a half-inch beard is the least restrictive means available to further that interest.

Respondents first argued that their no-beard policy is necessary because inmates might use beards to smuggle contraband into the prison. Although preventing the flow of contraband into a prison is a com-

pelling goal, respondents failed to demonstrate that allowing petitioner to grow a half-inch beard would undermine that goal. The magistrate judge who observed petitioner at the hearing remarked that it is "almost preposterous" to think that petitioner could hide anything in his half-inch beard. J.A. 155. And respondents' witnesses admitted that inmates have multiple places to hide contraband, including in mustaches and in hair that is longer than a half inch, both of which are allowed by respondents' grooming policy. The courts below erred by requiring petitioner to prove that respondents' security concern is exaggerated; it is *respondents* who must prove that their response is *not* exaggerated. They failed to do so.

Respondents similarly failed to demonstrate that refusing to allow petitioner to grow a half-inch beard is the least restrictive means of furthering their interest in easily identifying inmates who escape from prison. Petitioner pointed out that other prison systems take photos of inmates with and without beards in order to facilitate identification. Respondents did not explain why they could not employ that less restrictive practice. Nor did respondents explain why allowing inmates with dermatological conditions to grow quarter-inch beards is consistent with their identification interest while allowing petitioner to grow a half-inch beard is not.

Although respondents contend that allowing petitioner to grow a beard might either subject him to violence from other inmates or make him a leader among inmates, respondents introduced no evidence that either fear has any basis in reality. Petitioner has been allowed to maintain a half-inch beard throughout this litigation, and the record contains no

evidence of any problems. Nor did respondents produce any evidence that inmates with medical-exception quarter-inch beards have been either victimized or unduly revered by other inmates.

The record also does not establish that allowing petitioner to maintain a half-inch beard would impose administrative burdens on respondents. Respondents already have a system of monitoring inmates with medical-exception quarter-inch beards, and they did not establish that they would be unable to do the same for petitioner.

Finally, respondents failed to explain why they cannot adopt the less restrictive means adopted by nearly every other jurisdiction in the country. Respondents' witnesses professed ignorance about the practices of other jurisdictions; that is insufficient to meet respondents' burden to prove that their no-beard policy is the least restrictive means of furthering their compelling interests. Respondents also asserted that they cannot do what more than 40 other States, the District of Columbia, and BOP do because respondents' facility uses open barracks for housing and operates a farm work program. That explanation falls short under RLUIPA because other jurisdictions that allow beards also operate prisons with similar features and because respondents did not explain why they cannot use less restrictive alternatives such as assigning petitioner to non-barracks housing and non-farm work assignments.

ARGUMENT

RESPONDENTS FAILED TO DEMONSTRATE THAT BANNING PETITIONER'S HALF-INCH BEARD IS THE LEAST RESTRICTIVE MEANS OF FURTHERING THEIR COMPELLING INTERESTS

Respondents' grooming policy prohibits all Arkansas inmates from growing beards. The only exception to that policy permits inmates with certain medical conditions to grow a quarter-inch beard. Respondents make no exception for any inmate whose religious beliefs require him to grow a beard. Petitioner is such an inmate. Petitioner is an adherent of Islam and believes that his religion compels him to wear a beard. His request for an exemption from respondents' no-beard policy was denied, as was his proposed compromise that he be permitted to grow a half-inch beard. Respondents' refusal to allow petitioner to grow a half-inch beard substantially burdens his religious exercise.[1] RLUIPA requires respondents to justify that burden as the least restrictive means of furthering a compelling government interest, and respondents failed to satisfy their burden in this case.

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[1] The magistrate concluded that the no-beard policy does not substantially burden petitioner's religious exercise because he is able to engage in other types of religious exercise such as maintaining the required diet and observing certain religious holidays. J.A. 176-177. That conclusion was error and the court of appeals did not endorse it, holding instead only that respondents established that their policy is the least restrictive means of furthering a compelling penological interest. J.A. 186. In their brief in opposition, respondents did not appear to contest that their policy imposes a substantial burden on petitioner's religious exercise.

A. RLUIPA Requires Defendants To Prove That Imposing An Identified Substantial Burden On An Individual Inmate's Religious Exercise Is The Least Restrictive Means Of Furthering A Compelling Government Interest

1. The "[l]awful incarceration" of an individual "brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Pell* v. *Procunier*, 417 U.S. 817, 822 (1974) (brackets in original) (quoting *Price* v. *Johnston*, 334 U.S. 266, 285 (1948)). An inmate does not check his constitutional rights at the prison door; but when the full protection of a right would be "inconsistent with proper incarceration," the Constitution offers less protection than it would to a person who is not incarcerated. *Overton* v. *Bazzetta*, 539 U.S. 126, 131 (2003); see *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 348 (1987) (*Shabazz*); *Pell*, 417 U.S. at 822. In the prison context, this Court has upheld restrictions on constitutional rights when the regulation that imposes the restriction is "reasonably related" to "legitimate penological interests." *Turner* v. *Safley*, 482 U.S. 78, 89 (1987); see *Bazzetta*, 539 U.S. at 131-137 (restrictions on freedom of association); *Shaw* v. *Murphy*, 532 U.S. 223, 228-232 (2001) (limits on inmate correspondence); *Thornburgh* v. *Abbott*, 490 U.S. 401, 407-419 (1989) (restrictions on receipt of subscription publications); *Shabazz*, 482 U.S. at 348-353 (work rules limiting inmates' attendance at religious services).

RLUIPA statutorily elevates the protection afforded to inmates' religious exercise by replacing *Turner*'s requirement that a burden on a First Amendment free-exercise right be reasonably related

to a legitimate penological interest with a requirement that such a burden survive heightened scrutiny. Section 3(a) of RLUIPA prohibits a state or local government from imposing a substantial burden on the religious exercise of an institutionalized person unless the government can demonstrate that the burden "is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. 2000cc-1(a). RLUIPA requires a plaintiff to bear the burden of establishing that a challenged practice substantially burdens his religious exercise. 42 U.S.C. 2000cc-2(b). In contrast, RLUIPA requires defendants to establish that the burdensome practice or regulation "is the least restrictive means of furthering [a] compelling governmental interest. 42 U.S.C. 2000cc-2(b), 2000cc-5(2). In particular, RLUIPA requires a defendant to justify imposition of the burden on the specific plaintiff challenging the practice or regulation under RLUIPA's compelling-interest standard. 42 U.S.C. 2000cc-1(a)(1) (requiring government to "demonstrate[] that imposition of the burden on *that person*" "is the least restrictive means of furthering [a] compelling governmental interest") (emphasis added).

In upholding RLUIPA against an Establishment Clause challenge in *Cutter* v. *Wilkinson*, 544 U.S. 709 (2005), this Court noted that, in the application of RLUIPA's substantive standard, "[c]ontext matters." *Id.* at 723 (brackets in original) (quoting *Grutter* v. *Bollinger*, 539 U.S. 306, 327 (2003)). The Court acknowledged that the lawmakers supporting RLUIPA "anticipated that courts would apply the Act's standard with 'due deference to the experience and expertise of prison and jail administrators in

establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with considerations of costs and limited resources.'" *Ibid.* (quoting *Joint Statement*, 146 Cong. Rec. at 16,699); *id.* at 725 n.13 ("It bears repetition, however, that prison security is a compelling state interest, and that deference is due to institutional officials' expertise in this area."); see *id.* at 720 ("Properly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries."). Those lawmakers also recognized, however, that prison regulations and policies grounded on "mere speculation" or "exaggerated fears" will not suffice to meet RLUIPA's requirements. *Joint Statement*, 146 Cong. Rec. at 16,699 (quoting S. Rep. No. 111, 103d Cong., 1st Sess. 10 (1993)).

2. RLUIPA does not permit, much less require, courts to second-guess prison officials' well-informed judgments about what security measures are necessary to the safe and effective operation of a correctional institution. Deference to the penological expertise and judgment of such officials is not due, however, unless the officials explain how a challenged regulation advances a compelling government interest. Prison security is obviously a compelling government interest. But not every restriction on an inmate's religious liberty furthers that interest. RLUIPA assigns to defendants "the burdens of going forward with the evidence and of persuasion" on whether a burdensome practice serves a "compelling governmental interest." 42 U.S.C. 2000cc-1(a), 2000cc-5(2). Prison administrators cannot meet that burden by simply asserting a security interest or citing adminis-

trative burdens. They must explain the connection between the relevant restriction and improved security.

Even when a restriction does serve a compelling government interest, moreover, a prison official must demonstrate that the restriction is the least restrictive means of furthering that interest. To satisfy that burden, a defendant must explain why a less restrictive practice would be insufficient to further the prison's compelling interest. The defendant must also explain why providing a limited exception to a general policy where necessary to alleviate a substantial burden on an individual's religious exercise would undermine such interest. A prison administrator's unsubstantiated statement that lifting or lessening a substantial burden would impede a prison's ability to further a compelling interest is insufficient to carry the defendant's burden.

RLUIPA thus requires courts to balance the deference due to the expertise of prison administrators with the statute's requirement that defendants do more to justify the imposition of a substantial burden on religious exercise than rely on speculation or unjustified fears. Courts generally perform that balancing by requiring prison administrators to offer evidence—usually in the form of affidavits from prison officials—explaining how the imposition of an identified substantial burden furthers a compelling government interest and why it is the least restrictive means of doing so, with reference to the circumstances presented by the individual case. Once a defendant has offered such evidence, courts grant due deference to the expertise brought to bear in formulating the prison's policies. See, *e.g.*, *Koger* v. *Bryan*, 523 F.3d

789, 800 (7th Cir. 2008); *Washington* v. *Klem*, 497 F.3d 272, 283 (3d Cir. 2007); *Spratt* v. *Rhode Island Dep't of Corr.*, 482 F.3d 33, 39-40 (1st Cir. 2007); *Lovelace* v. *Lee*, 472 F.3d 174, 190 (4th Cir. 2006); *Hoevenaar* v. *Lazaroff*, 422 F.3d 366, 370 (6th Cir.), cert. denied, 549 U.S. 875 (2006). In light of RLUIPA's requirement that a defendant justify imposing a substantial burden on the particular plaintiff's religious exercise, see 42 U.S.C. 2000cc-1(a), courts have appropriately required that a defendant's explanation relate to the specific accommodation the plaintiff seeks and to the needs of the particular institution where the inmate is housed. See *Smith* v. *Ozmint*, 578 F.3d 246, 252-254 (4th Cir. 2009); *Odneal* v. *Pierce*, 324 Fed. Appx. 297, 300-301 (5th Cir. 2009).

As a means of ensuring that prison officials demonstrate that the application of a challenged practice to a particular plaintiff is the least restrictive means of furthering a compelling governmental interest, courts of appeals have appropriately required that officials demonstrate that they have considered whether there are alternative, less restrictive means of furthering the relevant interest. Prison officials need not undertake the "herculean burden" of "refut[ing] every conceivable option in order to satisfy the least restrictive means prong of" RLUIPA. *Hamilton* v. *Schriro*, 74 F.3d 1545, 1556 (8th Cir.) (applying RFRA), cert. denied, 519 U.S. 874 (1996). But when the complaining inmate identifies less restrictive alternatives that he would consider acceptable, prison officials must at least demonstrate that they have "considered and rejected the efficacy of" those alternatives. *Warsoldier* v. *Woodford*, 418 F.3d 989, 999 (9th Cir. 2005); see, *e.g.*, *Washington*, 497 F.3d at 284; *Murphy* v.

Missouri Dep't of Corr., 372 F.3d 979, 989 (8th Cir.), cert. denied, 543 U.S. 991 (2004).

At a minimum, defendants' obligation to address potential alternatives extends to those alternatives specifically identified in the course of the administrative grievance process. Incarcerated persons are required by the PLRA, 42 U.S.C. 1997e(a), to exhaust administrative grievance procedures prior to filing a suit under federal law with respect to prison conditions, including a suit to enforce RLUIPA. See *Cutter*, 544 U.S. at 723 n.12; J.A. 20-21, 25-26. The requirement that an inmate request a religious accommodation through a prison's internal grievance procedures permits prison officials and inmates to work together in the first instance to develop practical solutions that accommodate an inmate's religious exercise while advancing an institution's compelling interests. That process also serves the function of developing an evidentiary record about what potential alternatives would be acceptable to a plaintiff and why such alternatives would or would not adequately further the institution's compelling interests as applied to the plaintiff. If an inmate ultimately files suit under RLUIPA, a defendant should be prepared to address the feasibility of potential alternatives identified through the administrative process.

Moreover, if the record includes evidence that different prison systems—or different prisons within the same system—provide exemptions to a rule that imposes a substantial burden on religious exercise or otherwise utilize less restrictive means of furthering their interests, defendants must explain why they cannot adopt those less restrictive practices as well. *E.g.*, *Koger*, 523 F.3d at 801; *Spratt*, 482 F.3d at 42;

Warsoldier, 418 F.3d at 1000. The same is true with respect to evidence that the defendant institution permits exemptions for some purposes, religions, or populations, but not for others. *E.g.*, *Newby* v. *Quarterman*, 325 Fed. Appx. 345, 352 (5th Cir. 2009); *Mayfield* v. *Texas Dep't of Crim. Justice*, 529 F.3d 599, 614-615 (5th Cir. 2008). At the same time, courts recognize that "evidence of policies at one prison is not conclusive proof that the same policies would work at another institution." *Spratt*, 482 F.3d at 42. In the face of evidence that other institutions employ less restrictive means, an institution must satisfy the same burden generally applicable under RLUIPA: it must demonstrate that its practices are the least restrictive means of furthering its compelling interest under the facts at issue in the particular case.

B. Respondents Failed To Carry Their Burden Under RLUIPA Of Establishing That Prohibiting Petitioner's Half-Inch Beard Is The Least Restrictive Means Of Furthering Prison Security

1. Respondents argued below that their no-beard policy furthers their compelling interest in security in three ways. First, respondents argued that prohibiting beards of any length makes it harder for inmates to smuggle contraband into and around the prison. J.A. 84, 114-117, 130. Second, respondents argued that prohibiting beards of any length facilitates the identification and apprehension of escaped inmates who might otherwise be able to change their appearance quickly by shaving. J.A. 80. Finally, respondents argued that allowing petitioner to grow a half-inch beard might make him the target of violence (or admiration) from other inmates. J.A. 87, 118-119. Respondents also argued that allowing petitioner to

grow a half-inch beard would impose prohibitive administrative burdens on prison employees. J.A. 80. The district court and court of appeals erred in holding that respondents satisfied their burden under RLUIPA on the basis of these arguments.

a. Respondents' witnesses testified before the magistrate that, if inmates were permitted to grow half-inch beards, they would be able to smuggle contraband such as needles, drugs, razor blades, homemade darts, and cell phone SIM cards into the prison. J.A. 84, 114-117, 130. Preventing inmates from smuggling such contraband into a prison is a compelling interest; but a RLUIPA defendant does not satisfy his burden by merely asserting that prohibiting half-inch beards furthers that interest. The magistrate who directly observed petitioner stated that it is "almost preposterous to think that [petitioner] could hide contraband in [his] beard." J.A. 155. The magistrate nevertheless accepted respondents' explanation, believing that "the law is that [prison officials] get deference * * * if they're able to articulate that there is a concern" even if that concern has never "actually materialized." *Ibid.*; J.A. 154 (stating that "deference to the prison officials" is required "if they're able to state legitimate penological needs"). That was error.

Prison administrators are not entitled to deference based on an unsupported "state[ment]" or "articulat[ion]" of a penological "concern." J.A. 154-155. Congress specified in RLUIPA that the statute "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of [RLUIPA] and the Constitution." 42 U.S.C. 2000cc-3(g). Congress also required defendants to "meet[] the burdens of going forward with the evi-

dence and of persuasion" on whether imposing a particular burden on the specific plaintiff "is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. 2000cc-1(a), 2000cc-5(2). Respondents presented no evidence that an inmate could hide contraband in a half-inch beard. The magistrate erred by allowing respondents to prevail based on speculative assertions and exaggerated fears about what inmates *might* do. See *Joint Statement*, 146 Cong. Rec. at 16,699.

The court of appeals compounded the district court's error by placing the burden on petitioner to produce "substantial evidence" that the "response of prison officials to security concerns is exaggerated." J.A. 186. That formulation inverts the proper allocation of burdens. As discussed, prison officials bear the burden of demonstrating that a challenged restriction is *not* an exaggerated or speculative response to a perceived security risk. Once a plaintiff establishes a substantial burden, he has satisfied his burden of proof under RLUIPA unless or until the defendant "provides prima facie evidence that it has made, or has offered in writing to make, a specific accommodation to relieve such a substantial burden," at which point the plaintiff "has the burden of persuasion that the proposed accommodation is either unreasonable or ineffective in relieving the substantial burden." *Joint Statement*, 146 Cong. Rec. at 16,700. Respondents have not contended (let alone produced any evidence) that they at any point accommodated or offered to accommodate petitioner's religious need to grow a beard. The court of appeals thus erred in stating that petitioner had a burden to prove that respondents'

unsupported security concerns were exaggerated or otherwise unjustified.

The district court and court of appeals further erred by assuming that the result in this case was dictated by the Eighth Circuit's decision in *Fegans* v. *Norris*, 537 F.3d 897 (8th Cir. 2008). J.A. 154-157, 175-176, 186. Like this case, *Fegans* involved a challenge to respondents' no-beard policy; but (as the district court acknowledged, see J.A. 154) the plaintiff in that case sought to grow a longer beard. *Fegans*, 537 F.3d at 906. The district court and court of appeals in *Fegans* apparently did not require the defendants in that case to do more than merely articulate a security concern—but even setting that error aside, the Eighth Circuit's holding in *Fegans* that prison officials did not violate RLUIPA by declining to provide a *different* accommodation to a *different* inmate cannot dictate the result in this case. An inmate with a long beard may (or may not) present different security issues than an inmate with a half-inch beard. The inmate in *Fegans*, moreover, had a history of attempted escape and of smuggling contraband on his person. *Id.* at 900, 907. A prison might justifiably deny an accommodation to an inmate with such a history even though it might not properly do so to an inmate who lacks such a history.[2]

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[2] Some evidence in the record indicates that petitioner had an altercation with a prison barber who attempted to shave his beard. J.A. 70-73. Although petitioner announced that he was "at war" with the inmate barber, petitioner testified that he intended to convey only that he was upset with the barber and did not intend to threaten him. *Ibid.* Nothing in the record suggests that petitioner was disciplined in connection with that incident. In general, if an inmate who is permitted to grow a half-inch beard as an accommodation creates a security risk by initiating hostile alterca-

The magistrate's error (which was endorsed by the district court and court of appeals) is highlighted by respondents' policy of allowing inmates to wear the hair on their head longer than half an inch and to grow mustaches. Inmates can and do hide contraband in many places, including their hair and clothing. See J.A. 56, 85-86, 98, 103-104, 106, 110, 114, 117, 121-122, 127, 130. Respondents should have been required to explain how allowing petitioner to grow a half-inch beard would exacerbate that problem. They offered no such explanation. Respondents' contention that prison guards might be injured by searching a half-inch beard for contraband (even if the magistrate were incorrect to think it "almost preposterous" that petitioner could hide anything in such a beard) is insufficient to satisfy their burden when guards presumably have safe means of searching hair on a prisoner's head that is longer than a half inch and of searching mustaches.

b. Respondents also failed to carry their burden of proving that denying petitioner's request to grow a half-inch beard is the least restrictive means of ensuring that petitioner is easily identifiable and cannot quickly change his appearance if he escapes. Even without an accommodation, respondents' current grooming policy permits inmates who escape to quickly change their appearance by shaving a mustache or cutting their hair. See J.A. 85, 104-105. Respondents did not explain why allowing petitioner to grow a half-inch beard would undermine their compelling interest in security in a way that allowing inmates to grow mustaches and hair longer than a half inch would not.

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tions with a barber, it may be appropriate to withdraw that accommodation to further proper security interests.

In addition, respondents allow inmates with dermatological conditions to grow a quarter-inch beard even though those prisoners may change their appearance upon escape by shaving. In general, when a prison grants secular exemptions from a general rule but refuses to a grant a comparable religious exemption, the prison must demonstrate that the secular exemption does not undermine the purpose of the general rule in the same way that the requested religious exemption would. See *Washington*, 497 F.3d at 284-285; *Fraternal Order of Police Newark Lodge No. 12* v. *City of Newark*, 170 F.3d 359, 363-365 (3d Cir.) (Alito, J.), cert. denied, 528 U.S. 817 (1999).

Respondents also failed to explain why the approach taken in other jurisdictions is insufficient to advance the State's interest in facilitating recapture of prisoners who escape. Before the magistrate, petitioner explained that other jurisdictions have a practice of taking one photo of an inmate clean-shaven and another of the inmate with a beard. A prison system with two such photos would not have difficulty identifying an inmate who escaped regardless of whether he shaved his beard or kept it. (Indeed, the prison would be better off with respect to identifying that inmate than with respect to identifying a clean-shaven inmate who grew a beard after escaping.) When confronted with the two-photo approach, respondents' witness merely stated that, if the prison was not allowed to order an inmate to shave at all, it could not take a photo of him clean-shaven. J.A. 104. That response is inadequate for at least two reasons. First, respondents already have a photo of petitioner clean-shaven. Second, even if they did not—or even if a prison could show that a periodic shaving is needed to

update photos—surely requiring an inmate to shave once (or once a year or once a quarter) is a less restrictive means of furthering respondents' compelling interests than requiring him to shave every day.[3]

c. Similarly, respondents failed to establish that their refusal to allow petitioner to grow a half-inch beard was the least restrictive means of ensuring that petitioner did not become either the object of violence from other inmates or a leader among inmates. Respondents failed to introduce any evidence that that concern is well-founded. During the pendency of this case, petitioner has been permitted to grow and maintain a half-inch beard. J.A. 34-35, 183, 192. At the time of the magistrate's hearing, petitioner had been permitted to maintain a beard for more than two months. See J.A. 34-35, 48. Yet respondents introduced no evidence tending to show that petitioner's beard had marked him as either a target of violence or a candidate for leadership. See J.A. 57. Respondents also did not present evidence that inmates who are permitted to grow quarter-inch beards for medical reasons have ever been targeted or revered. Even in the prison context, the compelling-interest test is not "traditionally the sort of thing that can be satisfied by the government's bare say-so." *Yellowbear* v. *Lampert*, 741 F.3d 48, 59 (10th Cir. 2014).

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[3] Courts have noted that other prison systems either do use or could use a dual-photograph (or similar) system. *Ross* v. *Coughlin*, 669 F. Supp. 1235, 1240-1241 (S.D.N.Y. 1987); *Phillips* v. *Coughlin*, 586 F. Supp. 1281, 1284 (S.D.N.Y. 1984); see *Garner* v. *Kennedy*, 713 F.3d 237, 247 (5th Cir. 2013); *Ali* v. *Quarterman*, 434 Fed. Appx. 322, 325 (5th Cir. 2011); *Luckette* v. *Lewis*, 883 F. Supp. 471, 481 (D. Ariz. 1995).

Moreover, prison officials cannot prevail under RLUIPA's compelling-interest/least-restrictive-means standard by appealing to a general need for uniformity. In *Gonzales* v. *O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006) (*O Centro*), this Court rejected the federal government's argument that RFRA (which employs the same substantive standard as RLUIPA) did not require an accommodation where a statutory scheme "simply admits of no exceptions." *Id.* at 430. The Court explained that, except where "the Government can demonstrate a compelling interest in uniform application of a particular program, * * * RFRA operates by mandating consideration * * * of exceptions to 'rule[s] of general applicability.'" *Id.* at 435-436 (brackets in original) (quoting 42 U.S.C. 2000bb-1(a)). The Court noted that RFRA had expressly adopted the compelling-interest test as set forth in cases such as *Sherbert* v. *Verner*, 374 U.S. 398 (1963), in which the "Court looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants." *O Centro*, 546 U.S. at 431. The same is true in the context of RLUIPA.

d. Finally, respondents' invocation of the administrative burdens of permitting petitioner to grow a half-inch beard, see J.A. 80, 84, 107, is insufficient to satisfy RLUIPA's strict-scrutiny standard. Respondents' witness asserted that the prison could not "manage" a half-inch beard limit for "15,000 people" (*i.e.*, the number of inmates in the Arkansas Department of Correction system). J.A. 80, 102. Nothing in the record supports a supposition that

every inmate would request to grow a half-inch beard. Nor would RLUIPA give every prisoner the right to do so; RLUIPA requires accommodations to a prison practice only when the practice imposes a substantial burden on religious exercise. In interpreting RFRA, this Court rejected the federal government's argument that it should not be required to provide an accommodation based on fears that "there would be no way to cabin religious exceptions once recognized." *O Centro*, 546 U.S. at 430.

Moreover, respondents' contention that they could not adequately monitor the length of petitioner's beard is belied by the apparent ease with which they administer the medical quarter-inch-beard exception. Prison barbers use clippers on a regular basis to shave inmates who are granted the medical exception. Respondents made no showing that providing the same treatment to petitioner (with a slightly longer clipper guard) would impose any burden on respondents, let alone interfere with the furtherance of a compelling government interest.

2. a. As noted at p. 19, *supra*, when a RLUIPA defendant is presented with evidence that other prisons or prison systems employ less restrictive means of furthering the same compelling interest, the defendant must explain why those less restrictive means would not be sufficient in the particular prison at issue (and/or for the particular prisoner who is the plaintiff). Every prison in the country has a compelling interest in security. But the vast majority of state prison systems in this country permit inmates to grow beards either for any reason at all or at least for religious reasons. BOP would permit a beard such as that requested by petitioner here, 28 C.F.R. 551.2 ("An

inmate may wear a mustache or beard or both."), as would the vast majority of States, see *Garner* v. *Livingston*, No. CA-C-06-218, 2011 WL 2038581, at *2 (S.D. Tex. May 19, 2011) (noting "more than 40 of the 50 state prison systems allow their inmates to grow beards"), aff'd in pertinent part, 713 F.3d 237 (5th Cir. 2013); Dawinder S. Sidhu, *Religious Freedom and Inmate Grooming Standards*, 66 U. Miami L. Rev. 923, 955, 964-972 (2012) (suggesting more than 40 States, the District of Columbia, and BOP would allow petitioner to grow a half-inch beard). Only Alabama, Arkansas, Florida, Georgia, South Carolina, Texas, Virginia, and possibly Louisiana and New Hampshire would not accommodate petitioner's request. *Id.* at 970-972 (describing state policies); N.H. Dep't of Corr., *Manual for the Guidance of Inmates* 10 (2011) (limiting beards to a quarter inch). Evidence that other jurisdictions use less onerous practices may not always require a defendant to adopt less restrictive means of furthering its compelling interests. But particularly where the vast majority of other jurisdictions employ less restrictive practices, a defendant jurisdiction must at least explain why it cannot do so as well.

Even when applying a lower level of scrutiny (outside the RLUIPA context) to a prison's regulation of inmates' constitutional rights, this Court has noted that "the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction." *Procunier* v. *Martinez*, 416 U.S. 396, 414 n.14 (1974), limited on other grounds by *Abbott*, 490 U.S. at 413-414; see *Bazzetta*, 539 U.S. at 134 (upholding visitation policies and noting that "numerous other States have imple-

mented similar restrictions"); *McKune* v. *Lile*, 536 U.S. 24, 35 (2002) (upholding prison sex offender treatment program and noting that BOP and other States employed similar programs) (plurality opinion); *Turner*, 482 U.S. at 93 (relying on similar practices of BOP and other States in finding "no obvious, easy alternative" to a restriction on inmate correspondence); *id.* at 98 (striking down restriction on inmate marriage in part because BOP's less restrictive practice was an "obvious, easy alternative[]"). And in determining that a prison's use of race to segregate inmates must be subject to strict scrutiny in *Johnson* v. *California*, 543 U.S. 499 (2005), this Court relied on the fact that "[v]irtually all other States and the Federal Government manage their prison systems without reliance on racial segregation." *Id.* at 508.

b. In some circumstances, a prison may be able to demonstrate that it cannot offer the type of accommodation offered by other jurisdictions because of the unique features of a particular prison or because of the circumstances of a specific plaintiff. Under RLUIPA, a defendant must prove such an assertion with evidence. In this case, respondents' witness testified that he was not familiar with the less restrictive practices of other jurisdictions (although such practices were addressed in the RLUIPA challenge to the same grooming policy in *Fegans*, 537 F.3d at 905). J.A. 101-102, 105-106, 110-111, 119. A prison official cannot satisfy his burden under RLUIPA of establishing that a challenged practice is the least restrictive means of furthering a compelling government interest by expressing ignorance of the less restrictive practices of other jurisdictions. When such less restrictive practices are brought to an official's attention, the

official must take reasonable steps to understand how those practices work and to explain why they would not adequately advance the relevant compelling government interests in his prison.

Although respondents' witnesses testified that they did not know about the less restrictive practices of other prison systems (or about how successful such practices are at maintaining security), see J.A. 101-102, 105-106, 110-111, 119, they asserted that they could not adopt such practices in their facility because many inmates are housed in barracks-style quarters (rather than closed cells) and because inmates travel in and out of the prison to work on the prison's farm, J.A. 101-102. Those assertions are insufficient for two reasons.

First, respondents were required to explain why those features of their prison are incompatible with permitting petitioner to grow a half-inch beard. Contraband smuggling is a concern in all prisons and, as discussed at p. 24, *supra*, inmates have opportunities to smuggle contraband into and around prisons with or without a half-inch beard. Respondents' housing structure and farm work assignments may indeed increase the opportunities for contraband smuggling and distribution. But when inmates can smuggle contraband in their hair, mustaches, and clothing (to name a few hiding spots), it is not apparent that allowing petitioner to grow a half-inch beard would materially affect respondents' security situation. Respondents did not attempt to explain why an inmate with a half-inch beard who is assigned to work on the farm would have an easier time smuggling contraband into the prison than a similar inmate in another facility who is permitted to interact with the outside world in

a different way. It appears that at least some prison systems that allow inmates to grow beards have also assigned inmates to jobs outside the prison gates. *Shabazz*, 482 U.S. at 346 (New Jersey inmates had work details off prison grounds)[4]; *Baynes* v. *United States*, 302 Fed. Appx 334, 334-335 (6th Cir. 2008) (BOP facility transported inmates outside prison fence for work duties); *Jeldness* v. *Pearce*, 30 F.3d 1220, 1222-1223 (9th Cir. 1994) (Oregon prison programs included a forest camp and farm annex).[5] Similarly, some prison systems that permit beards also provide dormitory-style accommodations for inmates. See, *e.g.*, *Unger* v. *United States*, 110 F.3d 70 (9th Cir. 1997) (Table), 1997 WL 124332, at *5 (BOP-run facility houses inmates in "barracks-style 'flats,' which are large, open, common areas within the prison housing units"); *Taylor* v. *Michigan Dep't of Corr.*, 69 F.3d 76, 78 (6th Cir. 1995) (Michigan prison housed inmates "in a dormitory style barracks, with approximately 60 inmates to a room").[6]

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[4] See N.J. Dep't of Corr., *Understanding the New Jersey Department of Corrections Prison System* 17-18 (2007) (noting that New Jersey continues to offer "Agri-Industry" jobs and other outside jobs to some inmates).

[5] See Or. Dep't of Corr., *South Fork Forest Camp*, http://www.oregon.gov/doc/OPS/PRISON/pages/sffc.aspx (last visited May 28, 2014) (describing Oregon facility with forest camp work detail).

[6] See, *e.g.*, Mich. Dep't of Corr., *Chippewa Correction Facility (URF)*, https://www.michigan.gov/corrections/0,4551,7-119-1381_1385-5161--,00.html (last visited May 28, 2014) (describing Michigan correctional facility with dormitory-style housing); Mich. Dep't of Corr., *Muskegon Correctional Facility (MCF)*, http://michigan.gov/corrections/0,4551,7-119-1381_1385-5372--,00.html (last visited May 28, 2014) (same).

Second, respondents did not explain why less restrictive alternatives were not available. Respondents' witness testified that *some* inmates are housed in barracks-style dormitories. J.A. 101. Respondents should have explained why they cannot place petitioner in non-barracks housing and allow him to grow a half-inch beard there. It is also unclear from the record whether all inmates are required to take farm work assignments. If some inmates have inside assignments, respondents might be able to assign a bearded petitioner to such a job. RLUIPA requires actual consideration of such less restrictive alternatives—and if they will not adequately advance the government's compelling interests, RLUIPA requires a prison administrator to explain why that is so. Respondents did not meet that burden in this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MAY 2014

AMICUS CURIAE BRIEF

No. 13-6827

In the Supreme Court of the United States

GREGORY HOUSTON HOLT a/k/a
ABDUL MAALIK MUHAMMAD,
Petitioner,

v.

RAY HOBBS, Director, Arkansas
Department of Correction, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* DR. RONALD L. AKERS, DR. BYRON R. JOHNSON, AND DR. SUNG JOON JANG IN SUPPORT OF PETITIONER GREGORY HOUSTON HOLT a/k/a ABDUL MAALIK MUHAMMAD

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are sociologists who have researched and written extensively about the effects of religion or religious commitment on delinquency and recidivism.

Dr. Ronald L. Akers is Professor Emeritus of Criminology and Sociology at the University of Florida. Dr. Akers has conducted research and published in many areas and on many topics within criminology and is the author of one of the leading criminological theories: social learning theory. Dr. Akers is a Fellow of the American Society of Criminology ("ASC"), Past President of ASC, Past President of the Southern Sociological Society ("SSS"), a member of the SSS Roll of Honor, and recipient of the 1988 Edwin H. Sutherland Award from ASC for outstanding contributions to theory and research. Dr. Akers is also co-author of the leading textbook on criminological theories.

Dr. Byron R. Johnson is Baylor University's Distinguished Professor of the Social Sciences, founding director of the Institute for Studies of Religion, and director of the Program on Prosocial Behavior. Dr. Johnson is one of the leading authorities on the efficacy of religion on behavior and recidivism rates in prison populations, recently completed a series of empirical studies for the Department of Justice on

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[1] Pursuant to this Court's Rule 37, letters of consent from all parties for the filing of this brief have been submitted to the Clerk. *Amici* states that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *Amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

the role of religion in prosocial youth behavior, and is a Presidential appointment to the Coordinating Council for Juvenile Justice and Delinquency Prevention. He has been project director / principal investigator on many grants from private foundations as well as federal agencies including the Department of Justice, Department of Defense, U. S. Institute of Peace, Department of Labor, and the National Institutes of Health. Before joining the faculty at Baylor University, Dr. Johnson also directed research centers at Vanderbilt University and the University of Pennsylvania.

Dr. Sung Joon Jang is Associate Professor of Sociology at Baylor University. Dr. Jang's areas of research include crime and deviance, juvenile delinquency, drug use, religiosity and spirituality, and mental health. Dr. Jang has also serves as principal investigator or co-principal investigator on numerous grants from private foundations as well as the U.S. Department of Justice's Office of Juvenile Justice and Delinquency Prevention.

The outcome of this case is important to *Amici* because the Court's interpretation of RLUIPA could impact prisoners' access to religious resources that studies have indicated are so impactful on recidivism rates and could impact the ability of sociologists to continue to study the impact of religious programs on inmates' recidivism and prosocial development.

SUMMARY OF THE ARGUMENT

A series of studies shows that even relatively modest religious involvement in prison is one of the most significant factors in reducing the recidivism rate

of released prisoners. The effect of such religious involvement on a person's likelihood of being rearrested within three years of release from prison surpasses any effect that has been shown from most secular programs designed to prepare prisoners for life after prison. Inmates' recidivism rates only decrease as religious involvement increases. This effect is extremely beneficial to the state, not only because of the reduced recidivism rate but also because religious activities in prisons are volunteer-driven at no cost to the state, yielding an extremely economical form of rehabilitation.

Congress, in enacting RLUIPA, knew that protecting inmates' religious exercise would inconvenience prison administrators, but they were convinced that the benefits of religious involvement for prisoners outweighed the efforts that would be required of prison administrators. As Charles Colson, president of Prison Fellowship Ministries, told a House subcommittee, "[I]t is sheer social folly to place any obstacles in the way of the many prisoners who, on their own initiative, seek out ministers, priests, rabbis, Bible studies, and so forth." Whatever the motivation of individual prisoners, the available research confirms that religious programs are attractive, efficacious, and cost effective.

In this case, a narrow reading of RLUIPA has erected exactly the sort of obstacle to faith that Congress sought to prevent: prisoners may have a beard for medical reasons, but may not have a beard for religious reasons. This contravenes the plain text and purpose of RLUIPA.

ARGUMENT

I. Religious involvement while in prison is one of the most significant factors in reducing the recidivism rate of released prisoners.

A series of studies performed over the past two decades shows that even relatively modest religious involvement in prison is one of the most significant factors in reducing the recidivism rate of released prisoners. The effect of such religious involvement on a person's likelihood of being rearrested within three years of release from prison surpasses any effect that has been shown from most secular programs designed to prepare prisoners for life after prison.

A. Even moderate participation in a religious program while in prison can dramatically reduce recidivism rates.

Prison Fellowship, supported by over 22,000 volunteers, is the largest organized prison ministry in the United States. Prison Fellowship Ministries, *Restoration: Prison Fellowship Ministries 2013 Annual Report* (2013). Dr. Byron R. Johnson, Dr. David B. Larson, and Dr. Timothy C. Pitts conducted a study of Prison Fellowship programs in four different New York prisons. Byron R. Johnson et al., *Religious Programs, Institutional Adjustment, and Recidivism Among Former Inmates in Prison Fellowship Programs,* 14 Justice Quarterly 145 (1997). This study found that prisoners who attended ten or more Bible studies during a one-year period prior to release—less than one per month—were 27% less likely than prisoners who did not attend Prison Fellowship activities to have been arrested one year after release. *Id.* at 156 Table 3 (The

"high" participation column considers prisoners who attended at least ten Bible studies in the year prior to their release). In a more recent study tracking these same prisoners, Dr. Johnson found that those prisoners who had attended only ten or more Bible studies during the year before release maintained a 14% to 21% lower recidivism rate two to three years after release versus prisoners who did not attend Prison Fellowship activities the year before release from prison. Byron R. Johnson, *Religious Programs and Recidivism among Former Inmates in Prison Fellowship Programs: A Long-Term Follow-Up Study,* 21 Justice Quarterly 329 (2004).

The efficacy of religious prison reform programs—as reflected in the reduced inmate recidivism rates in the two studies of Prison Fellowship programs—is even more dramatic when contrasted with the results seen in similar studies of secular prison reform programs. One widely cited study found that secular prison reform programs are effectively worthless. Robert Martinson, *What Works? Questions and Answers about Prison Reform,* 35 Public Interest 22 (1974). More recent studies show that participation in secular programs designed to reduce inmate recidivism only reduced recidivism rates by 5% to 10% versus non-participation in the programs. Joan Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* 177 (2003).

B. Heavy religious participation while in prison yields even more dramatic reductions in recidivism.

Inspired by the success of its prison ministries, Prison Fellowship decided to launch a program replacing its part-time volunteer approach to prison ministry with a completely faith-based approach to prison. In 1997, this program, the InnerChange Freedom Initiative Pre-Release Program ("IFI") was officially launched within the Texas Department of Criminal Justice ("TDCJ"). The Texas Legislature directed the Criminal Justice Policy Council ("CJPC") to evaluate IFI and other prison programs based on their success in reducing recidivism. Prison Fellowship also commissioned an independent evaluation of IFI and its participants.

Under IFI, Prison Fellowship was responsible for all inmate programs while TDCJ was responsible for only security and custody. The IFI programs themselves, which in 2000–2001 cost $1.45 million, were funded by Prison Fellowship, not by the state of Texas. Effectively, the IFI program forged a private-public partnership that (2) is extremely economical for the state, and (2) tests the proposition that a "sacred-secular" collaboration can achieve the civic purpose of reducing recidivism and thereby increasing public safety.

The CJPC and the independent evaluation of IFI found that IFI graduates—those who completed the IFI program—were 32.7% less likely to be arrested within two years after graduation and 28.3% less likely to be incarcerated within two years after graduation than inmates who did not complete the IFI program. In a

comparison of IFI inmates with a matched group, IFI graduates had a 16.3% lower recidivism rate than that of the matched group. Brittani Trusty & Michael Eisenberg, Criminal Justice Policy Council, *Initial Process and Outcome Evaluation of the InnerChange Freedom Initiative: The Faith-Based Prison Program in TDCJ* 23 (2003).

Following its success with IFI in Texas, Prison Fellowship partnered with Minnesota to implement the IFI program at the Minnesota Correctional Facility—Lino Lakes, a medium-security prison. This Minnesota IFI program, started in 2002, was subject to a rigorous evaluation that controlled for 27 variables shown to increase or mitigate recidivism risk. Grant Duwe & Michelle King, *Can faith-based correctional programs work? An outcome evaluation of the InnerChange Freedom Initiative in Minnesota,* 20 International Journal of Offender Therapy and Comparative Criminology 1 (2012). This study found that, when compared with the control group, participation in the Minnesota IFI program reduced recidivism by 26% for rearrest, 35% for reconviction, and 40% for reincarceration for a new offense. Grant Duwe & Byron R. Johnson, *Estimating the Benefits of a Faith-Based Correctional Program,* 2 International Journal of Criminology and Sociology 227, 232 (2013). Participation in Minnesota's IFI program did not affect revocations for technical violations, however. *Id.* As a result of these reduced recidivism rates, Minnesota's IFI program saved the state approximately $3 million in its first 6 years—almost $8,300 per inmate who participated in IFI. *Id.* at 236.

C. Whatever the motivation of individual prisoners, the available research—which is limited for practical and legal reasons—confirms that religious programs are attractive, efficacious, and cost effective.

Religious programs for inmates are not only among the oldest but also among the most common forms of rehabilitative programs found in correctional facilities today. This high prevalence of use is confirmed by the United States Department of Justice, which reports representative data on America's prison population. Among all other types of personal enhancement programs offered in prison, religious activities attracted the most participation: 32 percent of the sampled inmates reported involvement in religious activities such as Bible studies and church services, 20 percent reported taking part in self-improvement programs, and 17 percent reported that they had been involved in counseling. This national survey verifies what many correctional practitioners and volunteers have observed for years: that many inmates attend and participate in religious programs.

Despite the widespread presence of religious programs in American prisons, social science research remains limited for two reasons. First, federal agencies and private foundations have rarely funded or prioritized research on faith-based programs within the field of corrections. Second, because the Establishment Clause has been interpreted to require voluntariness and a complete lack of coercion in custodial religious programs, social science researchers must rely on quasi-experimental designs rather than classical

experimental designs. For example, researchers may not randomly assign prisoners into experimental "religious" groups and "control" groups without risking litigation by Establishment Clause practitioners who argue it is unconstitutional to force prisoners into religious programs.

Although quasi-experimental designs have been commonly used and accepted by scholars for decades, critics of in-prison religious programs often argue that the favorable data are the result of selection bias: inmates who volunteer for religious programs are already qualitatively different from the general population of inmates—more accepting of authority, more motivated to self-improvement, more amenable to behavioral change. Relatedly, these critics also argue that religious programs provide resources widely unavailable to the general population of inmates, offering "false incentives" to proclaim one's faith and the extent to which faith effects behavioral change. Citing these selection bias factors, critics aver that any positive effects are the byproducts of qualitatively "easier" inmates self-selecting into a religious program that offers a richer menu of resources, services, and human contact.

There are at least two arguments that cut against the selection bias criticism. First, selection bias is of little to no import for public policy decision-makers and taxpaying citizens who are interested in results. If the critics acknowledge the favorable results and reduced recidivism, what does it matter that an individual prisoner may have ulterior motives for joining a religious program? Second, the selection bias may run in the opposite direction: inmates who gravitate to

religious programs for "false incentives" may be qualitatively identical to the general population or worse, skewing the sample downwards. In fact, this is exactly what Dr. Byron R. Johnson discovered in the evaluation of IFI. In-depth interviews with inmates revealed that many enrolled to get close to their hometown (*i.e.*, Houston), not because they were religious or wanted to participate in a faith-based program. Likewise, interviews with chaplains and correctional staff at the same prison indicated a general distrust of inmates enrolling in this religious program. Indeed, correctional staff almost uniformly indicated that many of the enrollees were "cons" hoping to impress the parole board and earn an early parole for having participated in a religious program. In other words, the faith-based program would attract inmates that were anything but devoutly religious. Such inmates would look for any angle to exploit to position themselves in a better light before prison authorities and the parole board. If religious programs rehabilitate such "cons," they will work with the general population, too.

II. Congress was persuaded that the benefits of protecting religious liberty in prisons warranted broad protection for prisoners' religious free exercise.

When Congress enacted RLUIPA, it weighed the benefit that granting religious free exercise rights to prisoners would provide against the burden that would be placed upon prison administrators. Congress determined that the scales tipped in favor of providing religious liberty to inmates. 42 U.S.C. § 2000cc-1 (2013) (limiting government's ability to burden

prisoners' religious exercise to those situations in which the government has a "compelling governmental interest" and uses the "least restrictive means of furthering that" interest).

After *City of Boerne v. Flores,* 521 U.S. 507 (1997), the House Subcommittee on the Constitution heard testimony from Charles Colson, President of Prison Fellowship Ministries (the parent entity of Prison Fellowship), that the loss of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, would particularly harm prisoners and their successful rehabilitation. Mr. Colson said,

> I've spent the last twenty years working in prisons. I've seen the doors slam shut to religious services on the whim of administrators. I have experienced the arbitrary refusal of officials to allow religious activities. And immediately after the [*Employment Division v.*] *Smith* decision, prison officials were able to prevent Jewish prisoners from wearing yarmulkes, deny Catholic prisoners access to a priest, and restrict Bible studies for evangelical prisoners.
>
> This would be serious enough if only the personal religious rights of prisoners were at issue. But in fact, there is a societal interest involved here as well. Religious observance by prisoners is strongly correlated with successful rehabilitation. While it seems pretty clear that the First Amendment would prohibit the government from overtly pressuring prisoners to practice religion, it is sheer social folly to place any obstacles in the way of the many prisoners

> who, on their own initiative, seek out ministers, priests, rabbis, Bible studies, and so forth. Yet I myself have spoken with wardens who seem more interested in cost containment than in rehabilitating prisoners, and who have told me that, were it not for prisoners' legal ability to sue for denial of free exercise, they would withhold even ordinary, mainstream, non-controversial forms of religious accommodation.

Protecting Religious Liberty After Boerne v. Flores: *Hearing Before the House Comm. on the Judiciary, Subcomm. on the Constitution,* 105th Cong. 3–11 (July 14, 1997) (statement of Charles W. Colson).

Later, during the hearings for the bill that would eventually become RLUIPA, Glenn S. Goord, Commissioner of the New York State Department of Correctional Services, submitted a statement to the Senate Judiciary Committee opposing the "least restrictive means" test for burdens on prisoners' religious exercise because it would "subject the day-to-day judgment of prison officials to an inflexible strict scrutiny analysis by federal courts...." *Issues Relating to Religious Liberty Protection, and Focusing on the Constitutionality of a Religious Protection Measure: Hearing Before the S. Comm. on the Judiciary,* 106th Cong. 174–75 (1999) (prepared statement of Glenn S. Goord). Despite his objection to the bill, Commissioner Goord also said, "[L]et me assure the members of this committee that every correctional administrator in the country recognizes the vital role played by most religious practices and beliefs in furthering inmate rehabilitation, in maintaining a sense of hope and

purpose among individual inmates and in enhancing overall institutional safety and well-being." *Id.*

Congress took note of the public-policy debate between prison administrators and prison reformers extolling the rehabilitative, recidivism-reduction benefits of religion. In the Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000, Senators Hatch and Kennedy said,

> It is well known that prisoners often file frivolous claims; it is less well known that prison officials sometimes impose frivolous or arbitrary rules. Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways.
>
> The House Subcommittee on the Constitution heard testimony to this effect from Charles Colson and Patrick Nolan of Prison Fellowship, and in great detail about violations of the rights of Jewish prisoners, from Isaac Jaroslawicz of the Aleph Institute. ...
>
> The compelling interest test is a standard that responds to facts and context. What the Judiciary Committee said about that standard in its report on RFRA is equally applicable to This Act:
>
> "[T]he committee expects that courts will continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good

> order, security and discipline, consistent with consideration of costs and limited resources.
>
> "At the same time, however, inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements." Senate Report 103–111 at 10 (1993).

146 Cong. Rec. S7774 (daily ed. July 27, 2000) (joint statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000) (brackets in original).

Like the inmates that Congress desired to protect in enacting RLUIPA, Gregory Holt has found new meaning for his life in his religion. Congress was aware that protecting prisoners' religious practices limits prison administrators, and Congress decided that removing obstacles to prisoners' rehabilitations is worth the effort. If RLUIPA is interpreted in such a narrow way that Gregory Holt is prohibited from having a beard for religious purposes—even though such beards are permitted for medical reasons—then Congress's purposes in enacting RLUIPA are thwarted and prisoners will be discouraged from seeking the religious help that is proven to help most.

CONCLUSION

For the foregoing reasons, the Court should hold that RLUIPA provides a broad protection for religious exercise in prisons and reverse the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-6827

In the Supreme Court of the United States

GREGORY HOUSTON HOLT, AKA ABDUL MAALIK MUHAMMAD,
Petitioner
v.
RAY HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTIONS, ET AL.
Respondents

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF OF ALABAMA, ALASKA, ARIZONA, GEORGIA, HAWAII, INDIANA, KANSAS, MISSISSIPPI, MONTANA, NEBRASKA, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, WEST VIRGINIA AND WYOMING AS AMICI CURIAE SUPPORTING RESPONDENTS

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INTRODUCTION AND INTEREST OF AMICI CURIAE

The *amici* States operate prison systems that provide varying degrees and kinds of accommodation for inmates' sincere religious beliefs. They value religious liberty and religious practice. But they also bear the ultimate responsibility for "maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody." *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974). Prison officials in the *amici* States already face "Herculean obstacles" in the "effective discharge of these duties." *Id.* Complying with the Religious Land Use and Institutionalized Persons Act (RLUIPA) should not require similar, heroic efforts.

In *Cutter v. Wilkinson*, the Court held that RLUIPA gives prison administrators the discretion they need to meet often irreconcilable objectives. The Court recognized that in evaluating RLUIPA claims, judges must defer to the experience and expertise of prison administrators "in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." 544 U.S. 709, 723 (2005). This deferential standard reflects both the Court's and Congress's longstanding judgment that courts are not best suited to weigh the unique challenges prison administrators face. The upshot of *Cutter* is that courts should credit officials' testimony that their policies achieve legitimate penological goals, instead of "second-guess[ing] the reasoned

judgments of prison officials." *Knight v. Thompson*, 723 F.3d 1275, 1282-83 (11th Cir. 2013).

It is the considered opinion of the *amici* States that *Cutter*'s deferential test appropriately balances the religious liberty of inmates with the unique institutional concerns of prison life. Prison life is not civilian life, and federal judges are not equipped to weigh the unique security concerns and resource constraints faced by prison administrators. Staffing and funding levels vary, as do the physical layouts and disciplinary problems of each prison. Prison administrators are in the best position to craft the restrictions necessary to maintain health and safety in the unique context of each prison's environment. The Court should continue to ascribe "due deference to the experience and expertise of prison and jail administrators." *Cutter*, 544 U.S. at 723.

In the light of these principles, Arkansas should win this case. Most prison systems have grooming policies for their prisoners, and some have no-beards grooming policies for their prison *guards* as well. The reason is that uniform grooming policies serve compelling interests in security, order, hygiene, and discipline. *Knight v. Thompson*, 723 F.3d 1275. A deferential standard does not require a prison to show that its policies are in line with a national trend. Nor does it require a prison to provide an individually-tailored policy for each inmate with a RLUIPA claim. Under *Cutter*'s deferential standard, the court of appeals should be affirmed.

SUMMARY OF ARGUMENT

I. The Court should continue to apply the *Cutter* standard and defer to Arkansas prison officials' judgment of how to meet their objectives.

A. There is no "special justification" for overruling *Cutter*. Precedents must be inconsistent with more recent decisions, unworkable, or poorly reasoned to be overturned. But the petitioner has presented no such justification. He has argued that RLUIPA should be applied exactly like RFRA—and it already is. RFRA and RLUIPA both apply strict scrutiny, and under both statutes, the court has considered prison regulations through a deferential lens. The petitioner implausibly claims that a deferential standard may limit religious liberty in the other contexts in which RFRA and RLUIPA operate. But deference is grounded in prisons' unique security concerns, which are not present in other contexts. Finally, *Cutter* works in practice. It has produced consistent results without protracted and costly litigation.

B. *Cutter* is not just stare decisis; it was rightly decided. Courts are not best suited to make the inevitable tradeoffs between liberty and security in the prison environment. Prison administrators best understand and respond to this inherently violent situation and thus deserve deference. For these reasons, Congress recognized that courts' traditional deference was necessary and expected this to continue under RLUIPA. Deference also keeps

RLUIPA consistent with the Establishment Clause by making sure religious liberty is not elevated above security concerns. Furthermore, it ensures that RLUIPA does not exceed Congress's Spending Clause authority by micromanaging how states run their prisons systems. *Cutter* correctly recognized the myriad of reasons deference is necessary for each State to run an effective, safe prison system.

C. The petitioner's arguments would undermine deference in practice. Deference in a federalist system means that states need not accept risks just because their neighbors have. They need not follow a national trend but can experiment with different ways to balance security and liberty. Deference also means that prisons need not show a compelling interest on an individualized basis. They must be able to apply uniform policies without reviewing each prisoner's past behavior and guessing at the future security risks he poses. Lastly, deference means that prison administrators can make their own judgments without hiring Rule 702 experts. Their very role is to safely administer prisons, and they must have the freedom to do so. Where security is at stake, states and their prison administrators must have the freedom to craft policies that balance liberty and security and enforce them uniformly.

II. Prison grooming policies do serve compelling state interests.

A. Sometimes policies must be uniform to be effective. Uniform dress and grooming policies serve

state interests in order, discipline and uniform treatment. Uniformity in grooming subordinates personal distinctions, advancing order and discipline in many contexts. Uniform dress and grooming policies also free guards and chaplains from the difficult task of administering case-by-case exemptions or making individualized grooming determinations. A uniform policy also means that religious persons are ensured equal treatment. There is no threat that the prison will accommodate practitioners of mainstream religions and overlook those who practice minority religions.

B. Further, prisons should not need to cite specific instances of their policies failing to prove a compelling interest. Arkansas need not give examples of prisoners hiding contraband in beards or changing their appearance in escape attempts. Arkansas has no examples because it has never allowed beards, and it should not have to change its policy and wait for it to fail. Prisoners are not presumptively trustworthy, and those requesting exemptions are no different. Prisons should be able to adopt prophylactic rules to proactively limit risk.

C. Lastly, Arkansas's concerns about escape, contraband, and medical conditions are plausible. In other prison systems, prisoners have so changed their appearance by shaving their beards that they were unrecognizable. These prisoners have used this to escape, walking right past guards who could no longer identify them. The threat of contraband is also real. In other prisons, inmates have hidden shanks, wire, rocks, tobacco, marijuana, razor

blades, and handcuff keys in their hair and beards. Moreover, long hair and beards have concealed medical conditions in other prisons. Grooming policies serve very real interests, protecting prisoners from contraband and medical conditions and making it more difficult for prisoners to escape.

ARGUMENT

I. The Court should defer to Arkansas prison officials about how to meet their institutional objectives.

The petitioner invites the Court to expressly or implicitly overrule *Cutter* and "apply the same strict-scrutiny standard that applies under the Religious Freedom Restoration Act (RFRA)" without meaningful "deference to defendant prison officials." Pet. Br. 12. The Court should decline the invitation.

To those more accustomed to civilian life, much of what goes on in prison may seem "almost preposterous," as the magistrate judge in this case put it. Inmates have been known to hide heroin in body cavities,[1] throw their own feces,[2] make alcohol with rotten bread,[3] and spray "foul-smelling mixture[s] of raw eggs and sour milk" out of plastic

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[1] *People v. Cornejo*, No. E058617, 2014 WL 1665628, at *2 (Cal. Ct. App. 4 Dist. April 28, 2014).

[2] *Cottrell v. Virginia*, No. 0795-13-2, 2014 WL 1707093, at *1 (Va. Ct. App. April 29, 2014).

[3] *People v. Saavedra*, No. G038747, 2008 WL 3979259, at *1 n.2 (Cal. Ct. App. 4 Dist. 2008).

shampoo bottles.[4] Prison administrators, not federal judges, are in the best position to make necessary tradeoffs between security and religious liberty in this environment.

A. There is no "special justification" for overruling *Cutter's* deferential standard.

Cutter's core rule creates a workable standard that allows prison administrators and prisoners to resolve disputes without the need for protracted litigation over each and every request for an exemption to a uniform prison policy.

1. The Court requires a "'special justification'" to overturn a long-standing precedent. *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014) (quoting *Dickerson v. United States*, 530 U.S. 428, 443 (2000)). The Court has wavered from precedents only when they are inconsistent with more recent decisions, *Halliburton,* 134 S. Ct. at 2411-12; "unworkable or badly reasoned," *Payne v. Tennessee*, 501 U.S. 808, 827 (1991); their "theoretical underpinnings are called into serious question," *State Oil Co. v. Khan*, 522 U.S. 3, 21 (1997); or they are a "positive detriment to coherence and consistency in the law," *Patterson v. McLean Credit Union*, 491 U.S. at 173. The petitioner has not even attempted to meet these standards for undermining *Cutter*.

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[4] *State v. Blackmon*, 719 N.E.2d 970 (Ohio 1998).

2. The petitioner and his amici make two weak arguments for undermining *Cutter*, neither of which amounts to a "special justification."

First, the petitioner argues that RLUIPA should be applied to state prisons exactly as RFRA is applied to federal prisons because the text of RLUIPA mirrors the text of RFRA. *See* Pet. Br. 16. But *Cutter* does not ignore the text of RLUIPA; it merely recognizes that the task of evaluating compelling interests depends on the context of the challenged governmental action. Although RLUIPA imposes the same strict scrutiny standard as RFRA, the Court has always considered context when applying any strict scrutiny review—whether statutory or constitutional. *See Grutter v. Bollinger*, 539 U.S. 306, 327 (2003). Under RLUIPA, as elsewhere, "[c]ontext matters." *Cutter*, 544 U.S. at 722-23 (citations omitted).

Moreover, before this Court held that RFRA could not constitutionally apply to the States, *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997), courts applying RFRA in the prison context adopted the same deferential standard under RFRA that this Court later approved for RLUIPA claims in *Cutter*. *See, e.g.*, *Diaz v. Collins*, 114 F.3d 69, 73 (5th Cir. 1997) ("It is our understanding that in enacting the RFRA, Congress intended to continue to extend substantial deference to prison officials in legitimate security matters."); *Hamilton v. Schriro*, 74 F.3d 1545, 1553 (8th Cir. 1996) (same); *George v. Sullivan*, 896 F. Supp. 895, 898 (W.D. Wis. 1995) (same). The legislative history establishes that Congress was aware of this body of case law when it enacted RLUIPA. 146 Cong. Rec. S7774-01 (Statements of

Senators Reid, Hatch, and Kennedy). Accordingly, there has never been a disparity between these two statutes as applied to claims arising from prisons. In fact, the lower courts have consistently relied on former RFRA prison cases in applying *Cutter*'s deferential standard. *E.g.*, *Hoevenaar v. Lazaroff*, 422 F.3d 366, 370 (6th Cir. 2005) ("RFRA cases according deference to prison decisions [are] applicable to cases brought pursuant to the RLUIPA.").

Second, the petitioner and his *amici* erroneously argue that deference in this context will limit religious liberty in other contexts. *E.g.*, Br. of Alliance Defending Freedom 13-14. But that argument is inconsistent with the Court's reasoning in *Cutter*. *Cutter* reflects the Court's understanding that there are special security concerns in prisons that do not extend to civilian life. *Cutter*, 544 U.S. at 722. In other words, the very point of the deferential standard is that prisons are *different* from other contexts. *Cutter*'s deference, grounded in prison security concerns, cannot be extended to religious liberty claims arising outside of prison, whether those claims are governed by other parts of RLUIPA, RFRA, or the First Amendment.

3. *Cutter*'s deferential standard works in practice by producing consistent results. Courts have generally applied *Cutter* to reach similar results on similar facts, regardless of a prisoner's particular religion. For example, the circuits have almost universally rejected prisoners' requests for complete religious exemptions from grooming policies, even though these prisoners' religions varied from Native

American,[5] to Rastafarian,[6] to Assemblies of Yahweh.[7]

Moreover, *Cutter*'s standard minimizes the need for protracted and costly litigation to address requests for a religious exemption from a generally applicable policy. Without deference, a prison system will always have to hire an independent consultant, conduct vast out-of-state discovery, or commission a costly study to win a RLUIPA case. For example, it will not be good enough for a prison administrator to testify that prisoners are constantly seeking new ways to introduce contraband into the prison. Instead, the prison will need some way of pointing to problems that have arisen from less restrictive policies in other prison systems—evidence they may not have without discovery on those other prison systems. And the impact of changing a security-based policy will not always be empirically verifiable in any event; prisons do not run computer databases to keep track of whether contraband is discovered in a prisoner's hair or in his pocket. Because prisoners love to litigate and because every aspect of prison life is covered by a policy of one kind or another, the Court can expect a lot of this complex, protracted litigation if it undermines *Cutter*'s deferential standard. *See Jones v. Bock*, 549 U.S. 199, 203 (2007)

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[5] *Longoria v. Dretke*, 507 F.3d 898, 904 (5th Cir. 2007); *Hoevenaar v. Lazaroff*, 422 F.3d 366 (6th Cir. 2005); *Knight v. Thompson*, 723 F.3d 1275 (11th Cir. 2013).

[6] *Maxwell v. Clarke*, 7:12CV00477, 2013 WL 2902833, at *1 (W.D. Va. June 13, 2013) *aff'd*, 540 F. App'x 196 (4th Cir. 2013).

[7] *Fegans v. Norris*, 537 F.3d 897, 900, 906 (8th Cir. 2008).

("Prisoner litigation continues to account for an outsized share of filings in federal district courts.").

B. *Cutter* was rightly decided.

Cutter is not only stare decisis, it was rightly decided. Four considerations persuaded the Court to adopt a deferential standard in *Cutter*, and they are still persuasive today.

1. Courts are not suited to make tradeoffs between liberty and security in the unique context of prisons. "The 'normal activity' to which a prison is committed" is a very unusual activity from the perspective of the rest of society: "the involuntary confinement and isolation of large numbers of people, some of whom have demonstrated a capacity for violence." *Pell v. Procunier*, 417 U.S. 817, 826-27 (1974). A prison administrator will necessarily have "a better grasp of his domain than the reviewing judge." *Bell v. Wolfish*, 441 U.S. 520, 548 (1979). Unlike courts, for example, prison administrators have the "ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Turner v. Safley*, 482 U.S. 78, 89 (1987). And, unlike judges, prison administrators will be familiar with the great lengths to which prisoners go to hide contraband and harm one another.

2. Deference is consistent with Congressional intent. Congress enacted RLUIPA against the backdrop of court decisions that deferred to prison officials under RFRA and the Constitution about how

best to meet security concerns. 146 Cong. Rec. S7774-01 (Statement of Senators Hatch and Kennedy). *E.g.*, *Bell v. Wolfish*, 441 U.S. at 547; *Pell v. Procunier*, 417 U.S. at 827. And Congress expressly recognized the need for courts to continue to defer under RLUIPA, expecting that "the courts will continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." S. REP. 103-111, 10, 1993 U.S.C.C.A.N. 1892, 1899-900. To that end, RLUIPA expressly references the Prison Litigation Reform Act of 1995, *See* 42 U.S.C. § 2000cc-2(e), which itself imposes a deferential standard. 18 U.S.C. § 3626 (requiring courts to "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief").

3. Deference minimizes RLUIPA's potential conflict with the Establishment Clause. As this Court recognized in *Cutter*, there is a non-frivolous argument that elevating religious interests "over all other interests" could violate the Establishment Clause. *Cutter*, 544 U.S. at 723 (citing *Estate of Thornton v. Caldor*, 472 U.S. 703, 709 (1985)). The Court appropriately responded to that concern by refusing to "read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety" or to "significantly compromis[e] prison security or the levels of service provided to other inmates." *Cutter*, 544 U.S. at 725. The doctrine of constitutional avoidance counsels in

favor of deferring to the considered judgments of prison administrators about whether and how to craft a religious exemption from a generally applicable prison policy. *See* Br. of Americans United for Separation of Church and State 15-18 (arguing that exemptions must be weighed "with care to ensure that the Establishment Clause's boundaries are respected").

4. *Deference keeps RLUIPA consistent with the Spending Clause.* RLUIPA applies by its terms to all state government "activit[ies] that receive[] Federal financial assistance." 42 U.S.C. § 2000cc-1(b)(1). Congress has the power to set conditions on the receipt of federal funds to further its policy objectives, but Congress cannot use those conditions to "require the states to govern according to Congress's instructions." *Nat'l Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (quoting *New York v. United States*, 544 U.S. 144, 162 (1992)); *see also South Dakota v. Dole*, 483 U.S. 203, 206 (1987). If the Court were to apply RLUIPA without meaningful deference to state prison officials, there would be very real questions about RLUIPA's constitutionality under the Spending Clause. *See Cutter*, 544 U.S. at 732 (Thomas, J., concurring) (explaining that "RLUIPA may well exceed the spending power"); *Charles v. Verhagen*, 348 F.3d 601, 608 (7th Cir. 2003) (holding RLUIPA constitutional because it gives each State "the freedom to tailor compliance according to its particular penological interests and circumstances").

C. Accepting the petitioner's arguments would overrule *Cutter* sub silentio.

Many of the petitioner's arguments implicitly reject the notion that prison officials should receive any meaningful deference. If these arguments are accepted, the Court would undermine, in practice, *Cutter*'s deferential standard.

1. *Deference means that, in a federalist system, States need not follow a national trend.* The petitioner makes too much of the fact that most of Arkansas's sister States would allow a prisoner to grow a beard. State experimentation is not a problem to be remedied; it is a "happy incident" to be encouraged. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). *Accord Chandler v. Miller*, 520 U.S. 305, 324 (1997) (Rehnquist, C.J., dissenting) ("mere novelty should not be a strike against" a state policy). As one Congressman put it, RLUIPA "mandates a uniform test, not a uniform result." 139 Cong. Rec. S14461-01. RLUIPA rightly preserves the autonomy of prison administrators to respond to their unique circumstances rather than engaging other prison systems in "a race to the top of the risk-tolerance or cost-absorption ladder." *Knight*, 723 F.3d at 1286.

Prison systems balance security and prisoner liberty in different ways. Two medium security prisons in Illinois prove the point. *Grayson v. Schuler*, 666 F.3d 450 (7th Cir. 2012); *Lewis v. Sternes*, 712 F.3d 1083 (7th Cir. 2013). Problems

with contraband increase as prisoners have more visitation, outdoor, and communal time. Dixon Correctional Facility solves the contraband problem with a strict grooming policy, but allows its inmates to go outside their cells for most of the day with additional visiting hours. *Lewis*, 712 F.3d at 1086. Big Muddy Correctional Facility, in contrast, has a more restrictive visitation policy and a less restrictive grooming policy. *Id.* Although these prisons have different policies, they are simply different ways to strike a balance between prisoner visitation, on the one hand, and the problems of smuggling contraband, on the other.

A similar dynamic likely explains the difference between the jurisdictions that prohibit beards and those jurisdictions with less rigorous grooming policies.[8] *See* Pet. Br. 25. In Alabama and Arkansas, for example, prisoners are typically confined in open barracks with 50 or more other prisoners. Resp. Br. 15. This mode of confinement allows prisoners more access to each other for socialization, entertainment, and education. But "open-barrack housing [also] allows for greater opportunities to exchange contraband and use weapons on other inmates," Resp. Br. 16, which is why this kind of housing is limited to low security prisoners in the federal

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[8] Petitioner says that Alabama, Arkansas, Florida, Georgia, South Carolina, Texas, Virginia, and Louisiana are the only state prison systems that prohibit beards. But he recognizes that many other prisons have grooming standards instead of strict rules, and it is impossible to know how prison administrators in those systems would apply those standards to petitioner. Pet. Br. 25.

system.[9] State prisons that house violent inmates in one-or two-person cells make a different trade-off that allows less restrictive grooming policies at the expense of prisoners' freedom of movement.

A deferential standard allows courts to take these issues into account without requiring a prison administrator to study, and distinguish, his prison's policies and inmate population from those of every prison that happens to have a less restrictive policy. Although evidence of other systems' policies may be "relevant," it cannot be "controlling." *Knight*, 723 F.3d at 1286; *accord Braunfeld v. Brown*, 366 U.S. 599, 608 (1961) (plurality opinion) (religious exception not required even though 21 of 34 jurisdictions provided one); *Chance v. Tex. Dep't. of Criminal Justice*, 730 F.3d 404, 411 (5th Cir. 2013); *Spratt v. R.I. Dep't of Corr.*, 482 F.3d 33, 42 (1st Cir. 2007); *Fowler v. Crawford*, 534 F.3d 931, 943 (8th Cir. 2008). The petitioner's argument that Arkansas must follow the policies of a majority of jurisdictions is inconsistent with meaningful deference to prison officials and fails to appreciate the many structural, population, and resource differences between prisons.

2. Deference means that States are not required to show a compelling interest on an individualized inmate-by-inmate basis. Prisons need the discretion to apply their policies in a uniform manner, without

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[9] *See* Federal Bureau of Prisons, About Our Facilities, http://www.bop.gov/about/facilities/federal_prisons.jsp.

reevaluating them for each individual inmate. In similar situations, this Court has recognized that "[t]he laborious administration of prisons [] become[s] less effective, and likely less fair and evenhanded" when a prison official has to make an individualized determination of whether to apply a uniform policy to a particular inmate. *Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 132 S. Ct. 1510, 1521 (2012). It is an especially "difficult if not impossible task" to identify "inmates who have propensities for violence, escape, or drug smuggling" that are greater than or less than any other inmate. *Block v. Rutherford*, 468 U.S. 576, 587 (1984).

The petitioner's argument that the prison must show a compelling interest and least restrictive means "with respect to the particular person whose religious exercise is burdened" would undermine these interests. Pet. Br. 17. Prison officials should not have to litigate a policy on an inmate-by-inmate basis. And courts should not have to wade through a flood of RLUIPA claims from litigious prisoners without the benefit of precedent from other inmates' cases. The Court should avoid a "complicated [RLUIPA] scheme requiring" prisons to treat prisoners differently "based on their behavior, suspected offense, criminal history, and other factors." *Florence*, 132 S. Ct. at 1522.

3. Deference means that prison administrators can draw on their own experience and intuition without hiring an expert witness under Rule 702. The petitioner erroneously argues that the prison witnesses in this case were not experts under Rule 702. Pet. Br. 49-50. This line of argument misses the

point of *Cutter*'s deferential standard. Courts defer to the judgment of prison officials, not merely because they "have a better grasp of [their] domain than the reviewing judge," but also because of their role in comprehensively administering a prison system. *Bell*, 441 U.S. at 548. "[T]he operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial." *Bell*, 441 U.S. at 546-48 (internal citations omitted). Indeed, this Court has recognized that "it is 'difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons.'" *Woodford v. Ngo*, 548 U.S. 81, 94 (2006) (citation omitted).

Even though "prison administrators may be 'experts' only by Act of Congress or of a state legislature," they are still due deference. *Bell*, 441 U.S. at 548 (quoting *Procunier*, 417 U.S. at 827). They are the ones who have to weigh competing claims on a limited pool of resources. They are the ones who have the "Herculean" task of "maintaining internal order and discipline" and "securing their institutions against unauthorized access or escape." *Procunier*, 417 U.S. at 404-05. Prison officials are due deference because of who they are, not just because of what they know.

* * *

To be sure, deference to prison administrators is not unlimited. But, where order and security are legitimately at issue, prison administrators must

have the discretion to evaluate and choose the best way to balance religious practice with those interests.

II. Prison grooming policies serve compelling state interests.

When he is not arguing that the Court should reconsider *Cutter*, the petitioner spends much of his brief downplaying the compelling interests served by prison grooming policies in general and Arkansas's in particular. Pet. Br. 28, 46. He makes three rhetorical moves to support this overarching argument. First, he erroneously argues that uniformity is not, in itself, an interest that supports Arkansas's policy. *Id.* at 17, 37, 43. Second, he wrongly faults Arkansas prison officials for failing to cite "specific example[s]" where a prisoner with a beard became a safety or security problem. *Id.* at 32, 38. Third, he mischaracterizes the officials' testimony about the interests that grooming policies serve as "conclusory" and "implausible." *Id.* at 32. The Court should reject these propositions.

A. Uniformity in dress and grooming serves the state interest in order, discipline, and uniform treatment of prisoners.

As an initial matter, Arkansas has an interest in a uniform grooming policy simply because it is *uniform*. The Court has never "doubt[ed] that there may be instances in which a need for uniformity precludes the recognition of exceptions" for religious

exercise. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006). Sometimes "granting the requested religious accommodations would seriously compromise [the government's] ability to administer the program," *id.* at 435, or otherwise "undermine the State's goal." *Braunfeld*, 366 U.S. at 608 (plurality opinion). This is such a case for at least three reasons.

First, one of the functions of a uniform dress and grooming policy is to establish order and discipline. This is why, for example, firefighters, police departments, and the military have such policies. Uniformity in appearance "encourages the subordination of personal preferences and identities" and develops "a sense of hierarchical unity by tending to eliminate outward individual distinctions." *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986). In the military or police force, the only relevant distinctions are based on rank. In prison, the only distinction is between inmates and guards.

Exemptions to such policies can breed resentment. *See, e.g., Baranowski v. Hart*, 486 F.3d 112, 125 (5th Cir. 2007) (plaintiff's preferred alternative "would breed resentment among other inmates"); *Hoevenaar*, 422 F.3d at 371-72 (crediting warden's testimony that requested exemption would "cause resentment among the other inmates"). In fact, Arkansas is not requiring anything more of its *prisoners* than what many prisons require of their *guards*. Almost all prisons have a grooming policy for their guards, as well as for their prisoners. In several systems, the grooming policy for guards prohibits beards to the same extent that Arkansas's inmate grooming policy does for inmates: no beards

are allowed unless medically necessary.[10] These uniform dress and grooming policies — for guards and prisoners alike — reinforce order and discipline in a setting where order and discipline are incredibly important.

Second, prison officials have an "essential interest in readily administrable rules" for interacting with those *convicted* of violating the law, no less than "with those *suspected* of violating the law." *Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 132 S. Ct. at 1522 (emphasis added). It is a simple matter to enforce a policy of no beards. It becomes much more complicated to enforce a policy allowing beards of certain shapes and lengths for certain prisoners, and denying them to others. At the very least, chaplains and guards must monitor beard

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[10] States with publicly-available no-beard policies for guards include **Alabama**, Alabama Department of Corrections, *Dress Code*, http://www.doc.state.al.us/docs/AdminRegs/_AR217.pdf; **California**, California Department of Corrections and Rehabilitation, *Operations Manual* at 221, http://www.cdcr.ca.gov/regulations/Adult_Operations/docs/DOM/DOM%202012/2012%20DOM-Combined.pdf; **New Mexico**, New Mexico Corrections Department, *Grooming and Physical Appearance for Correctional Employees* at 1, http://corrections.state.nm.us/policies/docs/CD-030400.pdf, **Oklahoma**, Oklahoma Department of Corrections, *Standards for Employee Personal Appearance* at 17, http://www.ok.gov/doc/documents/op110245.pdf, **South Carolina**, South Carolina Department of Corrections, *Uniformed Personnel Grooming and Attire Standards*, Rule 2.13, http://www.doc.sc.gov/pubweb/Employment/Policy/ADM-11-09.htm, and **Texas**, Texas Department of Criminal Justice, *Dress and Grooming Standards* at 4, http://www.tdcj.state.tx.us/divisions/hr/hr-policy/pd-28.pdf

lengths and keep track of exemptions at the expense of their other duties. *DeMoss v. Crain*, 636 F.3d 145, 154 (5th Cir. 2011).

Lastly, the government has an "interest in uniform treatment for the members of all religious faiths." *Goldman v. Weinberger*, 475 U.S. 503, 512 (1986) (Stevens, J., concurring). The exception requested by the petitioner may seem to be a reasonable accommodation because half-inch beards are mainstream. But that kind of reasoning creates the danger that a similar claim on behalf of another religious person will be dismissed as too extreme or unusual. As Justice Stevens once warned, "[i]f exceptions from dress code regulations are to be granted on the basis of a multifactored test," the degree to which the exemption is acceptable to the majority "inevitably" will "play a critical part in the decision." *Id.* at 512-13. The difference between a half-inch beard, a kouplock,[11] and a dreadlock "is not merely a difference in 'appearance'—it is also the difference between" a Muslim inmate like petitioner on the one hand and a Native American inmate or a Rastafarian on the other. *Id.* A prison system should be able to prioritize the benefit of not drawing those kinds of inter-religious distinctions in its grooming policy.

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[11] A kouplock is "a two-inch wide strip of hair beginning at the base of the skull and stretching down the back" that is associated with some Native American religions. *Knight*, 723 F.3d at 1277.

B. A prison should not need "specific examples" of policy failure to establish that its regulations serve a compelling interest.

Grooming policies like Arkansas's serve the government's compelling interests in security, order, and hygiene. *See, e.g.*, *Knight*, 723 F.3d 1275 (11th Cir. 2013); *Fegans v. Norris*, 537 F.3d 897, 908 (8th Cir. 2008). The petitioner erroneously argues that Arkansas cannot rely on these interests because its prison officials did not cite "specific examples" where beards have been used for bad ends. The petitioner is wrong to impose a "specific example" requirement on prison administrators.

As a practical matter, *of course* these Arkansas prison officials could not cite "any specific example[] from Arkansas" where "a prisoner who escaped could change his appearance by shaving his beard" or used his beard to conceal contraband. Pet. Br. 8. The reason is simple: *Arkansas does not allow prisoners to grow beards*. The very point of the grooming policy is to make sure these problems do not arise. The only way for Arkansas to develop "specific examples" would be by discovery of other states' prison systems, by hiring an expert witness from another system, or by experimenting with a less restrictive policy.

The Court should not impose a "try-and-fail" requirement on prison administrators. Obviously, a prison's case for denying an exception is the strongest when it has previously allowed the exception and bad things have come of it. But nothing in RLUIPA's text, history, or logic limits a prison system's ability to deny a religious exemption

to those circumstances. As the Court has recognized, "[r]esponsible prison officials must be permitted to act before the time when they can compile a dossier on the eve of a riot." *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 132-33 (1977). Congress did not adopt the pollyannaish presumption that prisoners are trustworthy until proven otherwise. And experience teaches that the inmates who sue for religious exemptions are no better or worse than others in this regard. *E.g.*, *Hoevenaar v. Lazaroff*, 422 F.3d 366, 371 (6th Cir. 2005) (prisoner challenging grooming policy "ha[d] a long history of possessing and hiding contraband" and "twice attempted to escape from prison").

A more realistic presumption is that prisoners will find a way to exploit an exemption if they can. Prisons are populated exclusively by people who have been convicted of crimes. Some attempt to escape, and the first such attempt will come without a prior history of escaping. Others start fights or riots, often without a prior history of doing so. Excluding contraband and maintaining control are constant struggles. The courts cannot "overestimate[]" the "murderous ingenuity of murderous inmates," and prisoner administrators should not be compelled to underestimate it. *Scarver v. Litscher*, 434 F.3d 972, 976-77 (7th Cir. 2006) (Posner, J.). "Prison officials need not endure assaults, drug indulgence, or sexual improprieties before implementing policies designed to prevent such activities in an uneasy atmosphere." *Fowler v. Crawford*, 534 F.3d 931, 939 (8th Cir. 2008). Prison administrators must have the ability to craft system-

wide, generally applicable policies without waiting for "specific examples" of policy failure.

C. Arkansas's concerns about escape, concealed contraband, and exacerbated medical conditions are plausible.

Although Arkansas's witnesses were understandably unable to talk in detail about other prison systems, the experience of other states establishes that uniform grooming policies serve compelling state interests. In other prison systems, beards and long hair have been instrumental in escape attempts. They have been used to hide contraband. And they have been used to conceal prisoners' medical conditions.

1. *Grooming policies prevent prisoners from altering their appearance to assist in an escape.* Grooming policies limit escape attempts and allow prisons to recover escapees more quickly. This is so because inmates with long hair or beards "can more easily change their appearance, should they escape, by cutting their hair." *Grayson v. Schuler*, 666 F.3d 450, 452 (7th Cir. 2012). States obviously have a compelling interest in "the ability to identify prisoners" and in "prevent[ing] [prisoners] from disguising themselves." *Harris v. Chapman*, 97 F.3d 499, 503-04 (11th Cir. 1996).

The notion of prisoners shaving their hair to help them escape is no speculative concern. There are documented instances where inmates have cut their hair or shaved their beards for this purpose. The former Director of the Virginia Department of

Corrections has testified in other litigation over grooming policies about one incident where an inmate cut his long hair and shaved his beard to escape. *See* Angelone Dep. 58-60, *Limbaugh v. Thompson*, 2:93-cv1404- WHA (M.D. Ala. Jul. 11, 2008). When the inmate was ultimately apprehended, it was "nearly impossible to identify him." *Id.* at 60. Another prisoner was able to walk out of the prison visiting area after cutting his hair and beard. *See* Johnson Aff. 8 (Doc. 17), *Allen v. Johnson*, No. 2:05cv311, (E.D. Va. 2005). Yet another inmate almost escaped when he cut his hair and beard to pose as a chapel volunteer. *Id.*

2. *Grooming policies prevent prisoners from hiding contraband in their hair or beards.* "Correctional officials have a legitimate interest, indeed a responsibility, to ensure that jails are not made less secure by reason of what new detainees may carry in on their bodies." *Florence v. Board of Chosen Freeholders of County of Burlington*, 132 S.Ct. 1510, 1513 (2012). For this reason, this Court has consistently upheld uniform "[p]olicies designed to keep contraband out of jails and prisons." *Id.*

Again, this is no speculative concern. Although it might seem far-fetched to those in civilian life, there are real-world instances where prisoners have endangered the lives of other inmates and guards by concealing contraband in their hair and beards. In Virginia, for example, prison staff found a 6 ¾ inch shank that an inmate had concealed in his long hair. Johnson Aff. 8 (Doc. 17), *Allen v. Johnson*, No. 2:05cv311, (E.D. Va. 2005). Another inmate hid a razor blade in his hair, which injured the guard who

searched it. Angelone Dep. 48, *Limbaugh v. Thompson*, 2:93-cv1404- WHA (M.D. Ala. July 11, 2011).

Prison grooming policies also deter contraband that may not be a weapon, but can undermine the control of prison administrators. A prisoner once hid small amounts of marijuana in his hair that he apparently procured during visitation. Johnson Aff. 7. Prisoners have also concealed wire, rope, rocks and tobacco in their hair. *See McRae v. Johnson*, 261 F App'x 554, 559 (4th Cir. 2008). In one South Carolina prison, a number of keys to handcuffs and doors went missing. Officers found the keys only after requiring the whole unit to cut their hair and shave their beards. Affidavit of Robert E. Ward (Doc. 30), *Green v. Ozmint*, CV 2:04-22074-22AJ (D.S.C. Jun. 23, 2005), *available at* 2007 WL 295593.

3. Grooming policies protect the health of inmates. They allow guards to easily uncover medical conditions and limit tick, lice and other pest problems. *See Knight*, 723 F.3d at 1284; *Grayson v. Schuler*, 666 F.3d 450, 452 (7th Cir. 2012). Medical staff have discovered black widow spiders in an inmate's hair. Angelone Aff. 5, *Limbaugh v. Thompson*, 2:93-cv1404- WHA (M.D. Ala. Jul. 11, 2008). Prisoners have also been treated for cysts, rashes, skin disease, lice, fungal infections, boils, parasites, mold growing on the scalp, lesions in scalp, psoriasis, bleeding scalp and dandruff due to long hair or beards. *Id.*

* * *

A grooming policy cannot remedy all the discipline, contraband, escape, and health problems in Arkansas's prisons. The petitioner is right, for example, that "prisoners can hide contraband in many other places" apart from their hair and beards Pet. Br. 33. But RLUIPA cannot reasonably be understood to mean that a prison is forbidden from adopting a policy that eliminates one way of undermining safety and security simply because it cannot eliminate them all. The court of appeals appropriately deferred to the judgment of Arkansas prison officials that their uniform policy was the best way to serve their interests in order and security, and it should be affirmed.

CONCLUSION

The Court should affirm.

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AMICUS CURIAE BRIEF

No. 13-6827

IN THE
Supreme Court of the United States

GREGORY HOUSTON HOLT
A/K/A ABDUL MAALIK MUHAMMAD,

Petitioner,

v.

RAY HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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INTEREST OF AMICUS[1]

Alliance Defending Freedom is a non-profit, public interest legal organization that provides strategic planning, training, funding, and direct litigation services to protect religious civil liberties and family values. Since its founding in 1994, Alliance Defending Freedom has played a role, either directly or indirectly, in dozens of cases before this Court, numerous cases before federal courts of appeals, and hundreds of cases before federal and state courts across the country, as well as in tribunals throughout the world.

Alliance Defending Freedom and its over 2,200 allied attorneys regularly litigate religious freedom cases. We rely not only on constitutional provisions, but also on statutes like the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") and the Religious Freedom Restoration Act of 1993 ("RFRA") to protect individuals and churches whose religious exercise is burdened by neutral and generally applicable laws. Alliance Defending Freedom has strong interest in ensuring that these laws, which are designed to alleviate government-

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[1] The parties granted mutual consent to the filing of *amicus curiae* briefs in support of either or neither party pursuant to S. Ct. R. 37.3(a). Documentation reflecting the parties' mutual consent agreement has been filed with the Clerk. Pursuant to S. Ct. R. 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

imposed burdens on religion, are preserved in a full and robust state.

SUMMARY OF ARGUMENT

Congress enacted RLUIPA and RFRA to heighten protection for religious liberty in the wake of *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). *Smith* permits neutral laws of general applicability to evade Free Exercise scrutiny, even though these laws have a substantial capacity to burden religious exercise not only of prisoners like Mr. Holt, but also of the many churches and religious institutions that we frequently represent. Continuing to rigorously apply the "compelling interest test" found in these statutes is critical to maintaining robust religious liberty protections against laws that appear neutral but profoundly restrict religion.

ARGUMENT

I. Congress Enacted RLUIPA and RFRA Because Neutral Laws of General Applicability Still Substantially Burden Religious Exercise.

"RLUIPA is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens, consistent with this Court's precedents." *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005). Congress first passed RFRA, 42 U.S.C. §2000bb *et seq.*, and shortly thereafter enacted RLUIPA, 42 U.S.C. §2000cc *et seq.* Both laws apply rigorous

scrutiny to government action that substantially burdens religious exercise.

Congress recognized that neutral laws of general applicability have the same capacity to burden religious exercise as discriminatory laws targeting religious practice. But neutral, generally applicable laws receive vastly different scrutiny under First Amendment jurisprudence in the wake of *Smith*.

Laws targeting religious practices or beliefs must "undergo the most rigorous of scrutiny." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (striking down a law targeting the ritual slaughter of animals). To survive strict scrutiny, discriminatory laws "must advance [government] interests of the highest order and must be narrowly tailored in pursuit of those interests." *Id.*

But neutral and generally applicable laws not only bypass the compelling interest test, they bypass Free Exercise scrutiny altogether. Persons must comply with neutral and generally applicable laws without regard to the burden on their deeply-held religious beliefs, the coercion of their conscience, the significance of the government's interest, or even the law's breadth of application. *See Smith*, 494 U.S. at 879 ("the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'") (quoting *United States v. Lee*, 455 U.S. 255, 263 n.3 (1982)).

Naturally, government officials work hard to avoid enacting laws that facially discriminate against religion. Today's most pervasive threat to religious exercise stems from the very laws that evade Free Exercise scrutiny – laws that facially appear to be neutral and generally applicable. Examples of such religious liberty threats are not limited to those in prison like Mr. Holt, but abound in the community at large. This brief will highlight two.

A. Facially Neutral Ordinances Often Have a Disproportionately Negative Effect on Churches.

Neutral and generally applicable laws are what RLUIPA was designed to remedy. After *Smith*, municipalities invariably claim regulations adversely affecting religious organizations are neutral and generally applicable. This leaves churches and other religious institutions with no legal remedy, or they face the difficult and expensive task of proving the law is in reality not generally applicable. And when they seek an exception, citing the many benefits churches bring to communities,[2] they are invariably met with "the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for

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[2] For a summary of benefits churches provide society at large, see W. Bradford Wilcox, Andrew J. Cherlin, Jeremy E. Uecker, Matthew Messel, NO MONEY, NO HONEY, NO CHURCH: THE DEINSTITUTIONALIZATION OF RELIGIOUS LIFE AMONG THE WHITE WORKING CLASS, *reprinted in* RELIGION, WORK, AND INEQUALITY, 227 (Lisa A Keister, John McCarthy, Roger Finke, eds., Emerald Group, 2012).

everybody, so no exceptions." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006).

1. *St. Mark Roman Catholic Parish Phoenix v. City of Phoenix*

Noise ordinances, at first blush, seem innocuous and easily justified. Whether at home or work, no one wants the distraction and irritation that accompanies overly loud machinery, traffic, or amplified music. But even neutral restrictions on loud noise can have a discriminatory effect on religious use.

The City of Phoenix, for instance, prohibited "unreasonably loud," "disturbing," and "unnecessary" noise. *See* Order Denying Motion to Dismiss and Granting Preliminary Injunction, No. 09-1830 (D. Ariz. March 3, 2010). Neighbors complained that St. Mark's carillon bells, which had been used to call the faithful to worship and remind them to pray regularly for 20 years, were too loud and prohibited by the ordinance.

The noise ordinance had already been enforced against another church's bell ringing. It resulted in a criminal conviction of the pastor – substantially burdening the free exercise rights of the church.

St. Mark sought relief from this burden on its religious freedom in federal district court. Predictably, the City moved to dismiss, contending the noise ordinance was neutral and generally applicable since all churches and similar entities

were treated the same. But the court saw through this ruse and applied strict scrutiny (utilizing the standard for content based restrictions on speech, non-neutral prohibitions on religious exercise as protected by the First Amendment, and Arizona's state version of RFRA), and found the City had a compelling interest in enforcing the noise ordinance against the church's bell ringing. But the court found the ordinance was *not narrowly tailored* because it exempted, *inter alia*, ice cream trucks (so long as they played "a pleasing melody").

Of course, the "ice cream truck exception" demonstrates the noise ordinance was not neutral and generally applicable at all. But that did not keep the City from making that argument based on its view that the *Smith* test only requires neutrality towards similarly situated entities. Expensive and time consuming litigation was necessary to correct the City's misreading of the law.

2. *Reed v. Town of Gilbert*

Another Arizona town (just outside of Phoenix) uses its religiously "neutral" sign code to treat churches less favorably than real estate agents and political organizations when it comes to temporary signs. *See* 707 F.3d 1057 (9th Cir. 2013) (affirming District Court's award of summary judgment to the Town) (writ of certiorari pending). Pastor Clyde Reed leads a small church that meets in facilities it rents from local schools. On weekends, he placed temporary signs on private property (with permission of the owner) inviting people to Good News Community Church and letting them know

where and when it holds services. Pastor Reed was cited by Code enforcement officials because he displayed signs longer than the few hours the Code allowed for non-profit signs announcing events.

The Church's signs were similar to those realtors put up on weekends to advertise open houses and the like. But realtors play by a much more lenient set of rules when posting their temporary signs. They can place 15 signs in the right of way along public roadways throughout the entire weekend. Pastor Reed was limited to just four signs per piece of private property, was unable to place signs in the right of way, and could only display signs in the few hours directly before and after services were held. Politicians' election signs enjoyed even more favorable treatment than those of real estate agents.

The City lumps churches in with other non-political charities advertising events, claiming its sign code ordinance is completely neutral because it treats most non-profits the same (studiously ignoring the fact that many political committees are non-profit). The district court and United States Court of Appeals for the Ninth Circuit have agreed with the City to date, holding that the church's signs are not treated less favorably than other similarly situated organizations. It matters not that politicians and those selling real estate are able to display more and larger signs for longer periods of time.

The Ninth Circuit relied heavily on its finding that the City had no discriminatory purpose in enacting the ordinance. But the City's purpose is

irrelevant when assessing whether free exercise and free speech rights are burdened. It was also a dubious finding on the facts. Once the litigation commenced, challenging an original law which singled out "religious assemblies" for discriminatory treatment, the City amended the ordinance. But instead of fixing the problem and treating churches fairly, it continued the discrimination by creating a new category of speakers comprised of churches and other non-profits – treating them all less favorably than politicians and real estate agents.[3]

Reed demonstrates that even a religiously "neutral" law can have a discriminatory effect on churches and other religious speakers. Strict enforcement of statutes like RLUIPA can help churches combat this ongoing unfair treatment.

B. Government Officials Often Manipulate Ordinances to Appear Neutral While Intentionally Restricting Religious Uses.

Undaunted by this Court's holding in *Lukumi*, municipal officials continue to purposely manipulate ordinances so that they discriminate against

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[3] Such "foxhole conversions" mid-litigation do nothing to mask government officials' intent in other contexts, such as cases involving the Establishment Clause, *see, e.g.*, *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 871-74 (1995) (finding county officials' initial religious intent in displaying the Ten Commandments could not be neutralized by the subsequent change in the display to comply with the law), but the city has prevailed so far. The topic of purposeful discrimination is addressed in the next section.

religious uses while appearing to be facially neutral and generally applicable. For example, this stratagem occurs at various stages in the zoning process, such as after a church applies for a special use permit, or as a litigation tactic after a suit for religious discrimination has been filed.

1. *Woodridge Church v. City of Medina*

Woodridge Church in Medina, Minnesota began to outgrow its building, which occupied a small portion of the church's 27.6 acres of land. It developed plans for expansion and eventually submitted an application for approval of those plans to the zoning board in 2009. For various reasons, the City was opposed to the expansion but realized its hands were tied since other land owners were permitted to expand their facilities to accommodate growth. So the City placed a moratorium on the construction of all church buildings for one year, even though Woodridge's application was the only one pending before the board at that time.

While that moratorium was in place, the City purposely gerrymandered its zoning ordinance so as to prohibit the church's proposed building project. It then lifted the moratorium and the Church sued under RLUIPA and several constitutional provisions in federal district court. No. 11-275 (Dist. Minn. 2011).

The City eventually settled – but not without filing a motion to dismiss and the expenditure of significant attorney time and effort on behalf of the Church. Without the threat of liability under

RLUIPA, the case would very likely still be in litigation.

2. *Tree of Life Christian Schools v. City of Upper Arlington*

Tree of Life is a religious school established in 1978 by several churches in Columbus, Ohio. It has grown substantially over the years such that it now conducts its school in several different locations throughout the metropolitan area. When AOL/Time Warner shut down its operations in Upper Arlington in 2009, the building housing its worldwide headquarters became available. But there were no suitable buyers and the building sat empty for many months till Tree of Life came along.

The Christian school bought the building over the protests of the city, which hoped that another large company like AOL/Time Warner would purchase it. The City claimed that this would result in greater city revenue through the economic synergy that would come with it. So far the City has failed to explain why a similar effect would not occur with a Christian school that employs numerous teachers and administrators and attracts students and their family members – all of whom would frequent surrounding businesses on a regular basis.

The City refused to allow Tree of Life to use the facility as a religious school, and the school sued under RLUIPA, the First Amendment, and other constitutional provisions. 2014 WL 1576873 (S.D. Ohio, April 18, 2014) (granting summary judgment to the City). It quickly became evident that RLUIPA

precedent made the City's legal position untenable since it allowed daycares in the zoning district where Tree of Life's building is located. *See Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004) (holding RLUIPA requires a municipality to allow religious assemblies in zoning districts where daycares are permitted).

But instead of settling the case, the City elected to amend its zoning code in the midst of litigation so as to "neutrally" prohibit daycares in the zoning district where the newly bought building is located. The City's non-neutral motive for doing so could not be more evident. It wants to exclude Tree of Life's religious school. Nevertheless, the district court found there was no disparate treatment of the religious institution and awarded summary judgment to the City. The case is currently on appeal to the United States Court of Appeals for the Sixth Circuit.

II. Redefining the Least Restrictive Means Test to Allow the Government Wide Discretion in Narrow Tailoring Would Undermine Important Religious Liberty Protections That Congress Placed in Statutes Like RLUIPA and RFRA.

RLUIPA was designed to eliminate burdens on religious exercise that are "unnecessary." *Cutter*, 544 U.S. at 716 (quoting 146 Cong. Rec. 16698, 16699 (2000) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA)). The primary means by which courts evaluate which government burdens are necessary and which burdens are not is the least

restrictive means test – the most rigorous standard in narrow tailoring. *See U.S. v. Hardman*, 297 F.3d 1116, 1130 (10th Cir. 2002) (calling the least restrictive means test a "severe form" of narrow tailoring).

Requiring the government "to demonstrate that no alternative forms of regulation would combat [the threatened] abuses without infringing First Amendment rights" avoids unnecessary intrusions upon religious exercise and strikes a sensible balance between conflicting interests of the highest order – sincerely held religious beliefs and compelling government interests. *Hardman,* 297 F.3d at 1130 (quoting *Sherbert v. Verner,* 374 U.S. 398, 407 (1963)).

In the prison context, the courts of appeals have consistently given effect to the plain language of RLUIPA and held that where potentially less restrictive measures exist, prison officials must demonstrate that they have considered and rejected these measures. Obviously this consideration must be in good faith and not merely a cursory formality. *See, e.g., Warsoldier v. Woodford*, 418 F.3d 989, 99 (9th Cir. 2005) (prison must consider and reject alternatives to demonstrate it has pursued the least restrictive means); *Washington v. Klem*, 497 F.3d 272, 284 (3d Cir. 2007) (same). But Respondents assert that it is the *prisoner's* job to rebut the government's conclusory assertion that other alternatives are "unworkable." Br. Opposing Writ of Cert. at 17.

Respondents' argument shifts the narrow tailoring burden to the plaintiff while expanding the deference accorded government decisions. By this standard, RLUIPA would proscribe none but the most egregious and over-reaching burdens on religious exercise. This contravenes Congress' intent that RLUIPA "be construed in favor of broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. §2000cc-3(g).

Weakening scrutiny of government-imposed burdens in the prison context will, in turn, weaken religious liberty protections in other applications of RLUIPA, as well as other statutes. Many federal statutes employ the same strict scrutiny language and least restrictive means test contained in RLUIPA's section three on institutionalized persons. *See, e.g.*, 42 U.S.C. §2000cc(a)(1) (religious land use), 42 U.S.C. §2000bb-1 (federal RFRA). Many states have likewise passed their own versions of RFRA, copying language from the federal statute.[4]

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[4] These states include Alabama, Ala. Const. art. I, §3.01; Arizona, Ariz. Rev. Stat. Ann. §41-1493.01; Connecticut, Conn. Gen. Stat. §52-571b; Florida, Fla. Stat. §761.03; Idaho, Idaho Code Ann. §73-402; Illinois, 775 Ill. Comp. Stat. 35/15; Kansas, Kan. Stat. Ann. §60-5303; Kentucky, Ky. Rev. Stat. Ann. §446.350; Louisiana, La. Rev. Stat. Ann. §13:5233; Mississippi, MS LEGIS (2014), 2014 Miss. Laws WL No. 196 (S.B. 2681); Missouri, Mo. Rev. Stat. §1.302; New Mexico, N.M. Stat. Ann. §28-22-3; Oklahoma, Okla. Stat. tit 51, §253; Pennsylvania, 71 Pa. Stat. Ann. §2404; Rhode Island, R.I. Gen. Laws §42-80; South Carolina, S.C. Code Ann. §1-32-40; Tennessee, Tenn. Code Ann. §4-1-407; Texas, Tex. Gov't Code Ann. §110.003; and Virginia, Va. Code Ann. §57-2.02.

Reinterpreting the least restrictive means test to give the government wide discretion in narrow tailoring will trigger a ripple effect damaging to all religious freedom jurisprudence. Laws like RLUIPA and RFRA help relieve burdens on religious exercise that are substantial and unnecessary. They ensure that the government remains accountable even for the burdens imposed by neutral laws of general applicability. This Court should hold the State of Arkansas accountable by rigorously applying the least restrictive means test here.

CONCLUSION

RLUIPA should be broadly construed in favor of religious freedom. Congress designed RLUIPA, and laws like it, to alleviate substantial burdens on religious exercise from neutral laws of general applicability. Cases like *St. Mark v. City of Phoenix*, *Reed v. Town of Gilbert*, *Woodridge Church v. City of Medina*, and *Tree of Life Christian School v. City of Upper Arlington* demonstrate the need for heightened religious liberty protection in the wake of *Employment Division v. Smith*.

Strict scrutiny of government-imposed burdens on religious exercise plays a vital role in protecting religious freedom. Requiring government officials to articulate a narrowly tailored and compelling interest eliminates frivolous or arbitrary barriers to religious exercise. *Amicus* respectfully urges this Court to reaffirm the application of strict scrutiny in its full, robust state to ensure strong religious liberty protections for prisoners, churches, and other

religious institutions that find their religious liberty unnecessarily restricted.

Respectfully submitted,

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May 29, 2014

AMICUS CURIAE BRIEF

No. 13-6827

IN THE

Supreme Court of the United States

GREGORY HOUSTON HOLT
A/K/A ABDUL MAALIK MUHAMMAD,

Petitioner,

v.

RAY HOBBS, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION, *et al.*,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR *AMICI CURIAE* AMERICAN JEWISH COMMITTEE, UNION FOR REFORM JUDAISM, CENTRAL CONFERENCE OF AMERICAN RABBIS, WOMEN OF REFORM JUDAISM, BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Arkansas Department of Correction violated the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc *et seq.*, when it denied Petitioner's request to grow a one-half-inch beard in accordance with his religious beliefs with only speculative evidence of a compelling state interest and no evidence that its grooming policy presented the least restrictive means of meeting its purported interests.

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INTEREST OF *AMICI CURIAE*[1]

The American Jewish Committee ("AJC") is a nonprofit international advocacy organization that was established in 1906 to protect the civil and religious rights of Jews. As a strong advocate on behalf of religious liberty for people of all backgrounds, AJC has two interests in this case. First, AJC opposes the Arkansas Department of Correction's ("ADC's") refusal to grant religious exemptions to its Grooming Policy ("No Beard Policy") for short beards because this refusal has severe implications for Muslims, Jews, Sikhs, Rastafarians, and people of other faiths that prohibit shaving or cutting facial hair.[2]

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[1] Letters of consent from all parties to the filing of this brief have been submitted to the Clerk. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

[2] Many Muslims, including Salafi Muslims such as Mr. Muhammad, believe that wearing a beard is a key tenet of Islam. *See* Muhammed al-Jibaly, *The Beard Between the Salaf & Kalaf*, ch. 1 (1999). Similarly, ultra-Orthodox Jews and many Orthodox Jews believe that beards are an important part of their relationship with the divine. Jews trace the requirements of wearing a beard to their foundational text, the Torah, and can point to centuries of religious practices that include maintaining beards and, in some cases, growing side curls (*payot*). Eric J. Zogry, *Orthodox Jewish Prisoners and the* Turner *Effect*, 56 La. L. Rev. 905, 905 (1996). Sikhs are likewise required to keep their hair "unshorn," with the Sikh Code of Conduct identifying "dishonoring the hair" as the first forbidden practice of a Sikh. Dawinder S. Sidhu & Neha Singh Gohil, *Civil Rights in Wartime: The Post-9/11 Sikh Experience*, at 1, 23, 43 (2009). Rastafarians also are prohibited from shaving or cutting their hair, believing that a "fundamental tenet of the religion is that a Rastafarian's

Second, AJC believes that this case provides the Court with an opportunity to clarify the appropriate balance between scrutiny and deference under RLUIPA. While a majority of the Circuits apply a relatively limited form of deference to the testimony of prison officials, a minority (including the Eighth Circuit) are very deferential to prison officials' explanations of state interests. Allowing the inconsistent treatment of prisoners on an issue as important as religious freedoms is troubling—especially when the minority approach allows a prison to deny a religious exemption based on nothing more than an "almost preposterous" explanation of speculative state interests. AJC believes that in order for RLUIPA to meet its legislative purpose, it must be applied uniformly across the country in a way that provides meaningful protections to prisoners' religious freedoms.

The Union for Reform Judaism, whose 900 congregations across North America include 1.3 million Reform Jews, the Central Conference of American Rabbis ("CCAR"), whose membership includes more than 2,000 Reform rabbis, and the Women of Reform Judaism, which represents more than 65,000 women in nearly 500 women's groups in North America and around the world, come to this issue out of a commitment to religious freedom. RLUIPA affirms our nation's founding promise to protect the rights of religious expression from undue state interference. Americans of all faiths must be free to follow the dictates of their conscience.

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hair is not to be combed or cut." *Brown v. F.L. Roberts & Co.*, 896 N.E.2d 1279, 1283 (Mass. 2008); *see Benjamin v. Coughlin*, 905 F.2d 571, 573 (2d Cir. 1990).

The Baptist Joint Committee for Religious Liberty ("BJC") serves fifteen cooperating Baptist conventions in the United States, with supporting congregations throughout the nation, as an advocate for religious liberty and church-state separation. The BJC believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to religious liberty for all Americans. As chair of the Coalition for the Free Exercise of Religion, BJC worked with dozens of religious and civil liberties organizations toward the passage of RLUIPA and has defended its constitutionality and applicability in numerous cases in the courts.

SUMMARY OF ARGUMENT

Mr. Muhammad's case is a relatively easy one. ADC violated RLUIPA when it imposed a substantial burden on Mr. Muhammad's religious beliefs by capriciously denying his sincere request for an exemption to the No Beard Policy without showing that this decision was the least restrictive means to further a compelling government interest. *See* 42 U.S.C. § 2000cc-1(a). It is beyond dispute that the No Beard Policy imposed a substantial burden on Mr. Muhammad; it required him to shave a beard that he believed was mandated by his religion. *See Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981) (noting that it is for the prisoner to "correctly perceive[] the commands of [his or her] faith").

It is also painfully clear that ADC failed to meet its burden of proof. Under RLUIPA, the government must do more than invoke specters of generally accepted penological interests; it must provide individualized reasons and particularized evidence showing why the specific policy at issue furthers

those interests. Yet ADC's verbal assertions of state interests are speculative, at best, and severely undercut by the pre-existing exemption to the No Beard Policy for inmates with certain medical conditions, which allows beards almost identical to that requested by Mr. Muhammad.

Similarly, ADC has failed to establish that its grooming policy is the least restrictive means of furthering its interests. The overwhelming majority of prisons and jails in the United States allow their inmates to grow short beards for religious reasons. *See* Pet'r's Brief at 24-26. And neither ADC nor the lower courts have sufficiently explained why allowing a one-half-inch beard for religious reasons endangers prison residents and staff, but allowing a one-quarter-inch beard for medical reasons does not. Both of these facts make it impossible for ADC to establish that its prohibition on religious beards is truly the least restrictive policy that promotes its safety and security concerns. Because ADC cannot carry its burden under RLUIPA's statutory test, this Court should reverse the Eight Circuit's decision.

There is, however, another potentially more significant issue at play in this case. In reversing the Eighth Circuit, the Court should also clarify that deference does not completely control the analysis of a RLUIPA claim. The split among the Circuits shows that the appropriate level of deference to prison officials, a test that is fundamental to the purpose of RLUIPA, is an open question. This case offers an extreme example; ADC barely lifted a finger to support its speculative claims of security concerns, and there is hard evidence that the district court was far from persuaded. And yet ADC prevailed, because the Eighth Circuit's interpretation of RLUIPA is

so deferential that it requires the state to do nothing more than say the magic words of safety and security for prison staff and inmates. Whatever effect deference may have in a close case, it should not excuse the state from producing evidence to carry its burden, as any other litigant would have to do in any other case. To hold otherwise would read strict scrutiny out of the statute and defy congressional intent to protect prisoners' religious rights.

When Congress enacted RLUIPA, its message was loud and clear: religious rights should receive the highest possible protection in institutional settings. Certainly, "[c]ontext matters" in the unique environment of prisons and jails. *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005) (alteration in original) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 327 (2006)) (internal quotation marks omitted). But it is entirely possible for courts to account for that context while also giving significant protection to inmates' religious practices. Accordingly, this Court should reverse the Eighth Circuit's holding and, in doing so, adhere to the traditional meaning of strict scrutiny in its interpretation of RLUIPA.

APPLICABLE LAW

I. RLUIPA IS INTENDED TO PROTECT PRISONERS FROM FRIVOLOUS BURDENS ON RELIGIOUS EXPRESSION BY REQUIRING STRICT SCRUTINY

Congress drafted RLUIPA to ensure protections in two specific arenas with established records of religious discrimination. First, in the context of land use, Congress found that religious organizations such as churches received unfair treatment by local zoning boards. *Yellowbear v. Lampert*, 741 F.3d 48, 53

(10th Cir. 2014) (citing Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest and Under-Enforced*, 39 Fordham Urb. L.J. 1021, 1025-41 (2012)) (other citations omitted). Second, in the context of prisons and other state facilities, Congress found that "institutionalized persons are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion." *Cutter*, 544 U.S. at 721. Indeed, prior to RLUIPA's passage, testimony from Congressional hearings clearly established that, "[w]hether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways." *Id.* at 716 (quoting 146 Cong. Rec. 16,698, 16,699 (2000) (joint statement of Sens. Hatch & Kennedy on RLUIPA)) (internal quotation marks omitted).

In order for RLUIPA to accomplish its objective of protecting the religious rights of prisoners, both Congress and this Court have explicitly, and repeatedly, made clear that strict scrutiny should be applied to any prison decision that denies an inmate's request for a religious accommodation. In *Turner v. Safley*, 482 U.S. 78 (1987), and *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), this Court held that prisons could deny religious exemptions and other constitutional claims as long as the prison officials' explanations were rationally related to a legitimate penological interest. *Id.* at 89. Under *Turner* and its progeny, courts applied minimal scrutiny to prison officials' policy decisions and provided little to no consideration of prisoners' religious freedoms. *O'Lone*, 482 U.S. at 349-53; James D. Nelson, Note, *Incarceration, Accommodation, and Strict Scrutiny*, 95 Va. L. Rev. 2053, 2059 (2009). In response to *Turner* and the subsequent case, *Employment Division, Department of*

Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), in which the Court held that neutral laws of general applicability needed only to satisfy a rational basis review to survive claims for religious exemptions, Congress passed the Religious Freedom Restoration Act ("RFRA"), which reinstated strict scrutiny to *all* laws that substantially burdened the free exercise of religion. *Id.* at 2058; *see* 42 U.S.C. § 2000bb(a), (b). After this Court held that RFRA exceeded the scope of congressional power as it applied to the states, however, courts across the country reverted to a deferential approach to prison administrators in cases involving state prisoners. Nelson, *supra*, at 2059. Congress responded to this development by passing RLUIPA, which explicitly re-established strict scrutiny for government actions that impeded the religious exercise of all prisoners and other individuals in state facilities. *Id.*; *see* 42 U.S.C. § 2000cc-1. In *Cutter*, this Court recognized RLUIPA's strict scrutiny requirement, noting that the statute was part of Congress's "long running [effort] to accord religious exercise heightened protection from government imposed burdens." 544 U.S. at 714. Thus, both Congress and this Court have rejected a rational basis or deferential standard of review for RLUIPA claims and explicitly adopted and approved strict scrutiny for all prison actions or policies that burden an inmate's religious freedoms.

II. RLUIPA'S STRICT SCRUTINY REQUIRES PRISON OFFICIALS TO PROVIDE CREDIBLE EVIDENCE OF COMPELLING INTERESTS AND LEAST RESTRICTIVE MEANS

RLUIPA's strict scrutiny requirement comes from the text of the statute: "No government shall impose

a substantial burden on the religious exercise of a person residing in or confined to an institution even if the burden results from a rule of general applicability." 42 U.S.C. § 2000cc-1(a). A plaintiff bringing a RLUIPA claim bears the initial burden of proving the existence of a "substantial burden," which is generally defined as either compelling an individual to do that which violates his or her religious beliefs or prohibiting an individual from that which he or she believes is a necessary part of his or her religious practices. *Id.* § 2000cc-2(b); *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1314-15 (10th Cir. 2010); *see also Lying v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450-51 (1988); *Sherbert v. Verner*, 374 U.S. 398, 403-04 (1963). If the plaintiff fulfills this requirement, the burden shifts, and the government must "demonstrate[] that [the] imposition of the burden on that person (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest." 42 U.S.C. § 2000cc-1(a).

In evaluating whether a prison has met its burden of proof, courts must navigate simultaneously the ideas that prison policies are "normally left to the discretion of prison administrators," but that "[w]hen a prison regulation or practice offends a fundamental guarantee, federal courts will discharge their duty to protect constitutional rights." *Rhodes v. Chapman*, 452 U.S. 337, 349 n.14 (1981); *Procunier v. Martinez*, 416 U.S. 396, 405-06 (1974); Dawinder S. Sidhu, *Religious Freedom and Inmate Grooming Standards*, 66 U. Miami L. Rev. 923, 956-57 (2012). The Circuits are split on the appropriate level of deference that courts should afford prison officials' explanations, which has led to contradictory rulings. *Compare Yellowbear*, 741 F.3d 48, *Garner v. Kennedy*, 713 F.3d

237 (5th Cir. 2013), *Couch v. Jabe*, 679 F.3d 197 (4th Cir. 2012), *Jova v. Smith*, 582 F.3d 410 (2d Cir. 2009), *Koger v. Bryan*, 523 F.3d 789 (7th Cir. 2008), *Washington v. Klem*, 497 F.3d 272 (3d Cir. 2007), *Spratt v. R.I. Dep't of Corr.*, 482 F.3d 33 (1st Cir. 2007), *and Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005), *with Knight v. Thompson*, 723 F.3d 1275 (11th Cir. 2013), *petition for cert. filed*, 2014 WL 546539 (U.S. Feb. 6, 2014) (No. 13-955), *Fegans v. Norris*, 537 F.3d 897 (8th Cir. 2008), *and Hoevenaar v. Lazaroff*, 422 F.3d 366 (6th Cir. 2005). *See generally* Nelson, *supra*, at 2071-107 (explaining the two principal approaches, the "deferential model" and the "hard look model," taken by federal courts when deciding RLUIPA claims).

While there is disagreement among the Circuits about the appropriate level of deference to prison officials, given the strict scrutiny required by RLUIPA's statutory language, it should be beyond dispute that courts must engage in *some* meaningful inquiry into the prison officials' purported compelling interests and least restrictive means. At the very least, a prison should be required to provide credible evidence that granting the requested religious accommodation would have a detrimental impact on the inmate's facility. *Yellowbear*, 741 F.3d at 55 (citing 42 U.S.C. § 2000cc-1(a)). This is the only way that courts may reasonably evaluate whether the prison's specific penological interests are important enough, and its policies narrowly tailored enough, to trump a prisoner's rights to religious freedom and expression. As explained by this Court in the context of interpreting the essentially identical statutory language of the Religious Freedom Restoration Act ("RFRA"), courts must "look[] beyond broadly formulated interests" and "scrutinize[] the asserted harm of

granting specific exemptions to particular religious claimants." *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 431 (2006); *see also Yellowbear*, 741 F.3d at 58 ("Just because other prisons may have had a compelling interest in denying access to a sweat lodge in other circumstances doesn't necessarily prove, without more, that all prisons have a compelling interest in denying access to sweat lodges in all circumstances.").

ARGUMENT

I. ADC'S NO BEARD POLICY IMPOSES A SUBSTANTIAL BURDEN ON MR. MUHAMMAD

Here, there is no denying that Mr. Muhammad has met his initial burden of proof. The No Beard Policy expressly prohibits Mr. Muhammad from growing a beard pursuant to his religious beliefs. *See* J.A. 164 ("No inmates will be permitted to wear facial hair other than a neatly trimmed mustache that does not extend beyond the corner of the mouth or over the lip." (quoting ADC Admin. Directive 98-04) (internal quotation marks omitted)). Furthermore, each and every time ADC personnel enforce the No Beard Policy by subjecting Mr. Muhammad to a forced shave from a prison barber, Mr. Muhammad must choose between violating one of the key tenets of his religious beliefs or refusing the shave, which would undoubtedly lead to punishment or the withholding of benefits. Pet'r's Brief at 7 ("The warden stated: '[Y]ou will abide by ADC policies and if you choose to disobey, you can suffer the consequences.'" (alteration in original) (quoting Plaintiff's Exhibits at 6, ECF No. 13)).

II. ADC'S BARE ASSERTIONS ARE NOT SUFFICIENT TO SATISFY STRICT SCRUTINY UNDER RLUIPA

As this Court has previously observed, Congress expected courts to apply RLUIPA's strict scrutiny standard with "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." *Cutter*, 544 U.S. at 723 (quoting 146 Cong. Rec. at 16,699 (joint statement of Sens. Hatch & Kennedy on RLUIPA); S. Rep. No. 103-11, at 10 (1993)) (internal quotation marks omitted); *see also id.* at 725 n.13 (noting that "deference is due to institutional officials' expertise" in prison security). This combination of strict scrutiny with the need for deference is both novel and complex, raising many interpretive questions for federal courts adjudicating RLUIPA cases. For example, what role should deference play in a close case, where both the inmate and the state have introduced equally persuasive evidence? How much of a thumb does deference place on the scale in any RLUIPA case?

This Court need not, and should not, answer those questions here. In this case, the Court should merely clarify that deference cannot overwhelm strict scrutiny to such an extent that RLUIPA becomes a dead letter. As noted above, in the instant case, the lower court openly commented on the unconvincing nature of ADC's evidence; yet under the Eighth Circuit's extremely deferential precedent, the Magistrate felt he had no choice to but to rule in ADC's favor. By so grossly exaggerating the role of deference under RLUIPA, the Eighth Circuit has transformed strict

scrutiny into a forgiving test under which the state need only say the magic words—security of prison staff—and the court will rule in its favor, without doubting, questioning, or forcing the state to explain any of its reasoning.

This interpretation plainly contradicts the purpose and statutory text of RLUIPA. By citing the practical need for deference to prison officials' judgment in RLUIPA's legislative history, Congress could not have intended to relieve officials of their burden of producing any evidence, other than vague speculation regarding security concerns, as laid out in the statutory text. Such minimal proof would not suffice for any other litigant in any other context, and deference is not enough here. ADC's bare assertions do not suffice to carry its statutory burden on either element of RLUIPA, and therefore, this Court should reverse the judgment of the Eighth Circuit.

A. ADC Failed to Provide a Compelling Interest in Support of Its Denial of Mr. Muhammad's Exemption Request

The ADC claims that it properly denied Mr. Muhammad's request for an exemption to the No Beard Policy because an exemption could have negatively impacted the security of ADC's prison. Specifically, ADC speculated, without stopping to offer concrete evidence, that providing an exemption to Mr. Muhammad could: (1) hinder identification in the event of an escape, (2) make it easier for inmates to distribute contraband, (3) put officers tasked with searching beards for contraband at risk, and (4) lead to the perception that Mr. Muhammad received preferential treatment from the prison. Brief Opposing Writ of Cert. at 2-4. As support for its

position, ADC points to theoretical possibilities such as: the existence of contraband, such as SIM cards, that "would fit in an inmate's [one-half-inch] beard"; that the population entering the ADC is younger and more violent than previous populations; that there are numerous difficulties in attempting to monitor more than 15,000 inmates, and giving them an additional place to hide contraband would only compound the problem; that the inmates in Mr. Muhammad's Cummins Unit work "outside the fence," which provides additional opportunities for smuggling contraband; and that inmates had smuggled at least 1,000 telephones into ADC facilities in 2011. *Id.* at 2-6.

The ADC's security hypotheticals do not meet its burden of showing a compelling government interest. "[T]he mere assertion of security is not, by itself, enough for the Government to satisfy the compelling governmental interest requirement." *Washington*, 497 F.3d at 283. The ADC must show that an exemption *for Mr. Muhammad* would undermine security *at his facility*: the Cummins Unit where he was initially held, or the Varner Unit where he is now incarcerated. *See Gonzales*, 546 U.S. at 431; *see also Yellowbear*, 741 F.3d at 58. Here, ADC has provided no such evidence, despite the fact that Mr. Muhammad has been able to maintain a one-half-inch beard since October 2011.[3] If Mr. Muhammad's religious exemption posed a threat to prison security, it seems logical that ADC would be able to cite exam-

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[3] In October 2011, Mr. Muhammad won a preliminary injunction allowing him to wear a one-half-inch beard while his case remained pending. Both the district court and this Court subsequently stayed the lifting of that injunction, and it remains in effect pending the outcome of this appeal. Brief Opposing Writ of Cert. at 2-3, 7-8.

ples illustrating that over the past two and a half years Mr. Muhammad's beard had made the Cummins Unit or Varner Unit more dangerous. Yet, as the record below further demonstrates, ADC has failed to proffer any, let alone substantial, evidence supporting its claims that granting Mr. Muhammad an exemption to the No Beard Policy would in fact undermine a compelling state interest.

First, ADC has provided no evidence or explanation as to how Mr. Muhammad's beard grown for religious reasons undermines ADC's purported state interests while the beards that ADC allows for inmates with certain medical conditions do not. J.A. 164 ("Medical staff may prescribe that inmates with a diagnosed problem may wear facial hair no longer than one quarter of an inch." (quoting ADC Admin. Directive 98-04) (internal quotation marks omitted)). Under the ADC's logic, the fact that ADC could deny an inmate's request for a religious exemption because some inmates could hide contraband or weapons in their beards or cheeks should similarly serve as grounds to prohibit medically necessary beards. There is no indication, however, that ADC is considering ways to foreclose inmates from requesting medical exemptions or has ever denied an inmate's request to grow a beard for medical reasons. It is difficult to understand why ADC used claims of security concerns against an individual who sought a religious exemption, but ignored these very issues with respect to those needing medical exemptions, especially for concerns that ADC asserts rise to the level of "compelling." Other courts have found that similarly contradictory positions of correctional facilities failed to establish a compelling interest. As Justice Alito wrote while still on the Third Circuit: "We are at a loss to understand why religious exemptions threaten important city interests but

medical exemptions do not." *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 367 (3d Cir. 1999) (Alito, J.).

Second, the ADC's speculative security concerns are contradicted by its own policies with regard to health exemptions, as well as by RLUIPA's own statutory requirements. One of ADC's main arguments is that an inmate who qualifies for the religious exemption could grow a beard, escape from prison, and then shave to change his appearance and avoid detection (or, alternatively, that an inmate could shave and thereby avoid identification within one of ADC's facilities). But the premises of this argument conflict fundamentally with RLUIPA's requirement that the inmate *sincerely hold* the religious belief substantially burdened by the prison's policies. *See Cutter*, 544 U.S. at 725 n.13 (noting that RLUIPA "does not preclude inquiry into the sincerity of a prisoner's professed religiosity"); *see also, e.g.*, *Koger*, 523 F.3d at 797-98 (holding that an inmate's sincere religious beliefs meet RLUIPA's statutory definition, 42 U.S.C. § 2000cc-5(7)(A)). To argue that a Muslim inmate like Mr. Muhammad would opportunistically shave his beard to disguise himself is to assume that Mr. Muhammad does not sincerely hold the religious beliefs requiring him to maintain that beard. Indeed, it seems much more likely that an inmate who grew a beard only for medical reasons would choose to endure some physical discomfort if shaving a beard would allow him a better chance of avoiding detection. Moreover, as one prison official noted in a similar case, an inmate could also significantly change his appearance by shaving his head or dying his hair. *See Garner*, 713 F.3d at 247. ADC does not, however, appear to require all of its inmates to preemptively shave their heads in order to eliminate this risk.

Finally, ADC's wild conjecture that allowing Mr. Muhammad to maintain a beard could potentially lead to wide-spread contraband, prisoners on the run, and officers "being exposed to being cut, stabbed, and the like" when searching inmates' beards for contraband is insufficient to establish a compelling interest. Brief Opposing Writ of Cert. at 2-6. ADC's stated security concerns insinuate that a significant number of inmates would try to circumvent the No Beard Policy by claiming religious exemptions and that, masked in beards, they would be able to undermine the security in ADC facilities. Speculative concerns of "copycat" requests, however, are insufficient to establish a compelling government interest. *See Love v. Reed*, 216 F.3d 682, 690-91 (8th Cir. 2000); *see also Tolver v. Leopold*, No. 2:05CV82 JCH, 2008 WL 926533, at *3 (E.D. Mo. Apr. 3, 2008) (noting that denying an inmate a religious exemption due to "the risk of increased religious requests is not rationally related to any legitimate economic or administrative concern"). ADC offers no proof that there has been a run of applications for beards, or that there would be if a religious exemption were available. Moreover, ADC's concerns of copycat requests cannot possibly be sufficient to establish a compelling government interest, because to hold otherwise would gut RLUIPA. Presumably, Congress both understood and accepted the risk of increased requests for accommodation when it enacted the statute allowing such accommodations in the first place.[4]

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[4] ADC also proposed as a compelling security interest the risk of retaliation against Mr. Muhammad by other inmates due to perceived preferential treatment. This unpersuasive assertion rightly received minimal analysis from the district court, so it will not be addressed at length here. ADC fails to explain why

Upholding the Eighth Circuit's decision on these very weak facts would ignore the strict scrutiny required for RLUIPA claims and eviscerate the statutory protection of prisoners' religious beliefs. Congress could not have intended to pass a law under which a judge could find an asserted compelling interest to be "almost preposterous"—yet still be "constrained" to find for the state. Surely, in circumstances like these, on an issue for which the government carries the burden of proof, the demanding nature of strict scrutiny should require the court to engage in a meaningful inquiry and, absent a legitimate and compelling government interest, rule in favor of the inmate. Accordingly, the ADC has not carried its burden of proof by providing credible evidence of its compelling interest, and this Court should reverse the Eighth Circuit's judgment.

B. ADC's Bare Verbal Assertions Do Not Establish That the No Beard Policy Is the Least Restrictive Means of Furthering a Compelling Government Interest

The Court's inquiry does not end at determining whether the state's asserted interests are compelling. To pass muster under RLUIPA, a policy must also be the least restrictive means of furthering those interests. 42 U.S.C. § 2000cc-1(a)(2). Moreover, the

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granting special grooming privileges to Mr. Muhammad—but not to the other inmates who receive a medical exemption to the grooming policy—would subject Mr. Muhammad to possible retaliation. Moreover, ADC's cited concerns regarding *Mr. Muhammad's* safety, rather than the safety of other parties, are inconsistent with its focus on the security of the guards and other prison officials.

government bears the burden of persuasion on this element of the test. *Id.* § 2000cc-2(b).

Because ADC has not met its burden, the Court should reverse the holding below. The Eighth Circuit's extremely (and erroneously) deferential RLUIPA precedent prevented the district court from giving full consideration to Petitioner's proposed alternatives to the No Beard Policy. To the extent that RLUIPA actually requires states to prove that their policies are the least restrictive means, they must be required to explain why the practices of other institutions across a wide range of security classifications permit the exact religious accommodations that they claim are impossible to grant to their own inmates. Absent any proof that Arkansas prisons are different, ADC cannot successfully argue that other prisons' policies are irrelevant to identical considerations within its walls. Moreover, with respect to alternative, less restrictive policies—whether they originate in other institutions or not—the burden is on ADC to explain why such policies are impractical in their facilities. By allowing ADC to rely on bare verbal assertions that its policies are the least restrictive means, the Eighth Circuit has rewritten RLUIPA to relieve the state of its burden. This is insufficient under RLUIPA's strict scrutiny test.

1. The Vast Majority of American Prisons Allow Inmates to Grow Short Beards, Despite Identical Safety and Security Interests

In considering whether the ADC's No Beard Policy is the least restrictive means of furthering a compelling interest, this Court should compare that policy with the grooming policies of other institutions. This comparative analysis is both logical and

necessary under RLUIPA's statutory text, since "the phrase 'least restrictive means' is, by definition, a relative term [that] necessarily implies a comparison with other means." *Washington*, 497 F.3d at 284. Multiple courts have engaged in such comparisons when deciding similar cases. *E.g.*, *Garner*, 713 F.3d at 247; *Spratt*, 482 F.3d at 42; *Warsoldier*, 418 F.3d at 999. *But see Knight*, 723 F.3d at 1286 ("The RLUIPA does not force institutions to follow the practices of their less risk-averse neighbors, so long as they can prove that they have employed the least restrictive means ").

Courts need not compare policies blindly or without paying attention to possible differences among institutions. For example, minimum-security prisons may be materially different from medium- or maximum-security prisons, such that the appropriate policy in one setting "may not be identical" to the best fitting policy in another. *Warsoldier*, 418 F.3d at 999; *see also Yellowbear*, 741 F.3d at 58. Institutional size is another factor that may enter into the analysis, as larger facilities doubtless have different needs than smaller ones. *See Garner*, 713 F.3d at 247 (holding that a grooming policy prohibiting beards was not the least restrictive means, in part because of the more permissive policies of "prison systems that are comparable in size"). But if comparable institutions are able to safely impose less restrictive grooming policies, that information is highly relevant to determining whether a particular institution's policy is truly the *least* restrictive.

With respect to its No Beard Policy, ADC is in a tiny minority of states that fail to provide any way for religiously observant prisoners to grow facial hair. As Mr. Muhammad has already explained, at least 42

states—along with the District of Columbia and the Federal Bureau of Prisons—all permit inmates to maintain neatly groomed beards, or beards of a short length, for religious reasons. Pet'r's Brief at 24-26. In other words, Arkansas is one of just seven states that do not allow incarcerated Muslims, Jews, Sikhs, Rastafarians, and other individuals to grow beards in accordance with their beliefs.

It is possible that Arkansas has a good reason for deviating from this trend. There may be unique circumstances in that state,[5] or among its prison population, that make less restrictive policies exceedingly difficult or inadvisable to implement. For example, contraband items could be especially dangerous or common in Arkansas prisons, such that allowing beards there would simply pose too great of a risk. *Cf. Dothard v. Rawlinson*, 433 U.S. 321, 334-35 (1977) (finding Alabama prisons to be particularly violent and dangerous, therefore justifying certain employment restrictions for prison guards). But the burden is on the state to submit evidence explaining what those unique circumstances are. If ADC can provide "no explanation as to why [other] prison systems are able to meet their indistinguishable interests without infringing on their inmates' right to freely exercise their religious beliefs," then this Court should not rule in its favor. *Warsoldier*, 418 F.3d at 1000.

Surely, RLUIPA requires ADC to do more than simply say the magic words—safety and security of

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[5] Notably, the Federal Bureau of Corrections operates a medium- and a low-security prison in Forrest City, Arkansas, both of which have less restrictive grooming policies than ADC's facilities.

inmates and staff—in order to carry its statutory burden of persuasion. Yet under ADC's theory of RLUIPA, the government need only make such bare assertions, and strict scrutiny has been satisfied. Regardless of how many other institutions have allowed exactly the accommodation that Mr. Muhammad requests, there is no evidence that ADC has tried or even contemplated the grooming policies that appear to be functioning in 42 other states, the District of Columbia, and the Federal Bureau of Prisons (as well as in Mr. Muhammad's facility itself). Moreover, just as the experience and judgment of ADC's prison officials deserve some judicial deference, so do the experience and judgment of officials in the numerous U.S. prisons with less restrictive grooming policies. Unless ADC has actually performed an analysis showing that those policies would not work in Arkansas, it has not carried its burden of persuasion on this element of RLUIPA. To hold otherwise would remove the comparative element from the least restrictive means test and thereby rob the phrase of its core meaning.

2. ADC Did Not Show That It Actually Considered and Rejected Less Restrictive Alternatives, Including the Less Restrictive Medical Exemption

A second factor that this Court should consider is the extent to which ADC actually considered and rejected less restrictive alternatives, as well as its reasons for doing so. This inquiry is necessary under RLUIPA because, as explained above, whether a policy is the "least restrictive means" is an inherently comparative question. Thus, to carry its burden, the government must explain why it rejected alternative, less restrictive policies. *See Yellowbear*, 741 F.3d at

63 ("[T]he government's burden here isn't to mull the claimant's proposed alternatives, it is to demonstrate the claimant's alternatives are ineffective to achieve the government's stated goals."). Multiple lower courts have performed such analyses when reviewing RLUIPA claims. *E.g.*, *Washington*, 497 F.3d at 284; *Spratt*, 482 F.3d at 40-41; *Warsoldier*, 418 F.3d at 999; *see also Couch*, 679 F.3d at 203.

In this case, it would be especially difficult for ADC to argue that it considered and reasonably rejected one particular alternative—allowing inmates to grow a one-quarter-inch beard—because ADC already provides exactly this accommodation to inmates with certain medical conditions.[6] This medical exemption makes it extremely difficult for ADC to show that its No Beard Policy for religious inmates is truly the least restrictive means of furthering its security interests, because, as discussed above, the existence of that exemption demonstrates that a less restrictive facial hair policy is actually feasible within ADC's facilities. Surely, the same compelling interests that weigh against relaxing ADC's grooming policy for religious inmates also weigh against providing a medical exemption. Yet ADC has decided to tolerate these risks for medical reasons.

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[6] Below, Petitioner did not "assert 'that the medical exemption would satisfy his religious beliefs.'" J.A. 176 (quoting *Fegans*, 537 F.3d at 906)). Indeed, Petitioner's requested accommodation involves a slightly longer beard (one-half inch, rather than one-quarter inch) than the medical exemption allows. Nonetheless, the burden rests on ADC to establish (1) that Petitioner's requested one-half-inch exemption is significantly more burdensome or dangerous than the medical exemption, and (2) that ADC cannot provide at least a one-quarter-inch exemption for religious inmates.

This choice is unacceptable under RLUIPA. Part of RLUIPA's purpose is to elevate religious needs to a similar level as other considerations. And as the Tenth Circuit recently recognized, "[t]he whole point of . . . RLUIPA is to make exceptions for those sincerely seeking to exercise religion." *Yellowbear*, 741 F.3d at 62. In light of the high degree of protection that RLUIPA gives to inmates' religious rights, it is illogical for the same institution to provide an almost identical accommodation for medical reasons, while denying that same accommodation for religious purposes. *Cf. Fraternal Order of Police*, 170 F.3d at 366 (holding that a police department violated the Free Exercise Clause when it provided a medical exemption, but not an identical religious exemption, to its facial hair policy). RLUIPA tilts the balance in favor of the inmate in such cases.

To be sure, granting a religious exemption may involve some additional costs or administrative burdens on ADC, if only because a new exemption would increase the number of inmates eligible for special grooming privileges. But RLUIPA "may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise." *Garner*, 713 F.3d at 245 (quoting 42 U.S.C. § 2000cc-3(c)) (internal quotation marks omitted). Those costs are part of the legislative compromise struck by RLUIPA, and part of the burden that states voluntarily accept in exchange for receiving federal funding for their prisons and jails. Because ADC has failed to justify its rejection of less restrictive alternatives in this case, the Court should reverse the holding in ADC's favor below.

3. Even Under a More Deferential Version of the Least Restrictive Means Test, the Lower Court Decided Mr. Muhammad's Case Incorrectly

Even if this Court opts for a more deferential version of the least restrictive means element—for example, if it declines to compare institutions, or to analyze whether ADC actually considered and rejected alternative means—it should still reverse the judgment of the Eighth Circuit. The district court's opinion, which the Eighth Circuit summarily affirmed, incorrectly reached two interrelated conclusions: (1) that ADC had met its burden of persuasion on the least restrictive means element, and (2) that the instant case is indistinguishable from *Fegans*, 537 F.3d 897. Reversal or remand is warranted because the lower court failed to justify either of these conclusions.

First, the lower court did not provide any explanation as to why ADC's No Beard Policy is actually the least restrictive means of furthering the state's alleged compelling security interest. In particular, the lower court failed to address at least one of Mr. Muhammad's proposed alternatives: taking two different photographs of each inmate who grows a beard for religious reasons. J.A. 176. The lower court dismissed Mr. Muhammad's proposal because it was based on another state's policy, and comparisons between institutions are not required under the Eighth Circuit's more deferential interpretation of RLUIPA.[7] But even if courts are not required to

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[7] The only other point that the court mentioned in favor of ADC is an official's testimony "that an inmate might enter the ADC with a beard and maintain said beard until he escapes." *Id.* The

engage in prison-to-prison comparisons, or to give weight to other prisons' more permissive policies, they are nonetheless obligated to consider the feasibility of all less restrictive alternatives that the plaintiff actually proposes in order to determine whether the government's policy is actually the *least* restrictive. Here, the lower court did not fully explain why Mr. Muhammad's proposal was inadequate, and thus, it did not explain how ADC met its burden of persuasion on the least restrictive means element of the case. Accordingly, at the very least, this Court should vacate and remand to the district court for a fuller analysis of Mr. Muhammad's evidence.

The district court also incorrectly concluded that Mr. Muhammad's case was indistinguishable from *Fegans*. In fact, the compelling interests—and especially the security concerns—in the two cases are dissimilar, because the *Fegans* plaintiff wanted to wear an uncut beard, whereas Mr. Muhammad has requested a much shorter one-half-inch beard. 537 F.3d at 906 (noting that the *Fegans* plaintiff's faith "requires that he refrain from 'rounding the corners' of his beard, and [that] he was disciplined for wearing a beard that was uncut altogether"). The *Fegans* Court reasoned that "uncut beards create safety and security concerns that are not presented by clean-shaven faces or quarter-inch beards." *Id.* at 907. According to *Fegans*, uncut beards better enable inmates to disguise themselves and to transport contraband than quarter-inch beards. *Id.* *Amici* do not agree with *Fegans*' conclusion that uncut beards are impermissibly dangerous under RLUIPA. Still, even if *Fegans* were correct, it would strain credibility to argue that

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court provided no analysis or explanation of this remote possibility.

an extra quarter-inch of facial hair is enough to render a one-half-inch beard as dangerous as a beard that is completely uncut. Because the district court erred in concluding that a one-half-inch beard was more like an uncut beard than like a one-quarter-inch beard, the Eighth Circuit's judgment should be reversed.

For all of these reasons, ADC has not carried its burden of persuasion on the "least restrictive means" element of this case. Accordingly, the Court should reverse the holding in ADC's favor below.

CONCLUSION

For all the reasons stated above, the judgment of the Eighth Circuit should be reversed.

Respectfully submitted,

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May 29, 2014

AMICUS CURIAE BRIEF

No. 13-6827

In the Supreme Court of the United States

GREGORY HOUSTON HOLT
A/K/A ABDUL MAALIK MUHAMMAD,
Petitioner,

v.

RAY HOBBS, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization based in Washington, D.C. Its mission is to protect the rights of individuals and religious communities to worship as they see fit, and to preserve the separation of church and state as a vital component of democratic governance. Americans United has more than 120,000 members and supporters nationwide.[1]

Since its founding in 1947, Americans United has participated as a party, as counsel, or as an *amicus curiae* in many of the leading church-state cases decided by this Court and the lower federal courts. Notably, Americans United advocated for passage by Congress of the Religious Land Use and Institutionalized Persons Act, Pub. L. No. 106-274, codified at 42 U.S.C. §§ 2000cc *et seq.*, and filed an *amicus* brief in *Cutter* v. *Wilkinson*, 544 U.S. 709 (2005), arguing that the statute should be upheld against a facial challenge.

SUMMARY OF ARGUMENT

This case should have been easy. Petitioner seeks a modest exception to the prison's grooming policy

[1] *Amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. The parties' letters consenting to the filing of *amicus* briefs are on file with the Clerk.

that imposes no meaningful burdens on any other inmate or anyone else and is materially indistinguishable from an exemption that is available to other inmates who request it for nonreligious reasons. And there is not so much as a hint in the record that petitioner's request is anything other than a sincere attempt to comply with a religious duty in a way that is consistent with the conditions and demands of confinement. Accordingly, the requested accommodation should have been granted.

But while the right outcome here should have been obvious—to respondents and to the court below—evaluating requests for accommodations under RLUIPA is not always so easy. As this Court has consistently recognized, preserving religious liberty for all Americans requires striking a careful balance between respect for individuals' rights to practice their religion, on the one hand, and official neutrality in matters of faith, on the other. When government wishes to ameliorate the burdens that it has placed on religious exercise, it must do so in a way that does not impinge on the rights, or otherwise harm the interests, of others.

Amicus writes, therefore, in order to underscore the importance of adhering to and reaffirming the Court's carefully wrought doctrine for navigating the boundary between permissible religious accommodation and impermissible governmental support for religion. Critical in this regard is the Court's admonition that proper application of RLUIPA must always involve "tak[ing] adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Cutter*, 544 U.S. at 720. That requirement follows from the central Establishment Clause concern, and this Court's long-standing recognition,

that the right to practice one's faith freely is conditioned on the equal rights of others.

ARGUMENT

A. Petitioner's Modest Request For An Exemption From The Prison Grooming Policy Should Have Been Granted.

1. The Establishment and Free Exercise Clauses "express complementary values" but also "exert conflicting pressures." *Cutter*, 544 U.S. at 719. The underlying values are, therefore, "frequently in tension." *Locke* v. *Davey*, 540 U.S. 712, 718 (2004). That is true even when an accommodation is "legislative" rather than constitutionally mandated. *Cutter*, 544 U.S. at 720.

Permissive accommodations—those that are neither forbidden by the Establishment Clause nor required by the Free Exercise Clause—may serve the salutary purpose of ensuring that religious adherents do not unjustifiably face substantial, government-imposed burdens on their religious exercise. Properly conceived and carefully administered, permissive accommodations lie at the "play in the joints" between the Establishment and Free Exercise Clauses. *Locke*, 540 U.S. at 719.

But because permissive accommodations go beyond what the Free Exercise Clause requires, they also pose a particular risk of violating the core Establishment Clause value of "neutral[ity] in matters of religious theory, doctrine, and practice." *Epperson* v. *Arkansas*, 393 U.S. 97, 103-104 (1968). Accordingly, government must "pursue a course of neutrality toward religion,' favoring neither one religion over others nor religious adherents collectively over nonadherents." *Board of Educ. of Kiyras Joel Vill. Sch.*

Dist. v. *Grumet*, 512 U.S. 687, 696 (1994) (citation omitted).

2. As this Court observed in *Cutter*, in prisons "the government exerts a degree of control unparalleled in civilian society and severely disabling to private religious exercise." 544 U.S. at 720-21. "Institutional residents' right to practice their faith is at the mercy of those running the institution." *Id.* at 721 (internal quotation marks omitted). As a result, "'frivolous or arbitrary' barriers" frequently "impede[] institutionalized persons' religious exercise." *Id.* at 716 (quoting 146 Cong. Rec. S7774, S7775 (July 27, 2000) (joint statement of Sens. Hatch and Kennedy on RLUIPA)).

For nontraditional faiths, the burdens tend to be particularly onerous because inmates must "depend on government to facilitate their religious exercise by providing chaplains, worship space and time, and other aspects of religious life." Ira C. Lupu & Robert W. Tuttle, *The Forms and Limits of Religious Accommodation: The Case of RLUIPA*, 32 Cardozo L. Rev. 1907, 1933 (2011). Prison officials must make critical decisions about "the quantity, quality, [and] timing of the services provided." *Id.* at 1934. And when they make "substantive assessment[s] of the religious reasons for the request[ed]" accommodations (*id.* at 1933), their relative lack of familiarity with minority faiths and practices may lead them to deny accommodations reflexively: They may view central tenets of an inmate's belief system and critical components of worship or religious study as insubstantial or even frivolous. See *Cutter*, 544 U.S. at 716 n.5 (recounting congressional hearings that revealed accommodations being granted to some reli-

gions while identical accommodations were denied to other religions).

That risk may increase when prison officials rely on chaplains to evaluate and advise on accommodation requests. Prison chaplains regularly "express frustration over requests that they view as bogus or extreme"; and Protestant chaplains are more likely than Catholic or Muslim chaplains to view accommodation requests from minority or nontraditional faiths as being extremist. Pew Forum on Religion & Public Life, *Religion in Prisons—A 50-State Survey of Prison Chaplains* 16, 19 (Mar. 22 2012), http://goo.gl/cp3vUO. Thus, requests for accommodations by members of minority and nontraditional faiths may face additional obstacles, especially when the reviewing chaplain is a member of the majority faith.

3. RLUIPA was Congress's attempt to alleviate the special burdens that prison life may place on inmates' freedom of conscience. *See Cutter*, 544 U.S. at 714-715. The statute provides that, for prisons that receive federal funds, "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, * * * unless the government demonstrates that imposition of the burden on that person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a). This approach "was not required as a matter of constitutional law under the Free Exercise Clause"; rather, it was an additional statutory protection. *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 439 (2006). Accordingly, RLUIPA's reach is

necessarily circumscribed by the prohibitions of the Establishment Clause.

Given these parameters, prison officials must walk a careful line in considering requested accommodations under RLUIPA. They must generally permit worship and religious study and practice while ensuring that their institutions do not engage in religious favoritism, foster pressure to conform in matters of faith, or otherwise burden the rights of others.

4. In *Cutter*, the Court outlined the test for determining whether an inmate's request crosses that line. The inmate plaintiffs in *Cutter* sued the State of Ohio for failing to accommodate their exercise of "nonmainstream" religious beliefs, thus implicating their rights under RLUIPA. 544 U.S. at 712. Ohio responded by contending that RLUIPA is facially incompatible with the Establishment Clause. See *id.* at 713. But the Court flatly rejected the State's argument, reasoning that "§ 3 of RLUIPA fits within the corridor between the Religion Clauses." *Id.* at 720. In so holding, the Court explained that RLUIPA does not "elevate accommodation of religious observances over an institution's need to maintain order and safety" but instead requires that "an accommodation must be measured so that it does not override other significant interests." *Id.* at 722. The Court recognized that RLUIPA must be applied "with 'due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.'" *Id.* at 723 (citations omitted). But, the Court held, religious accommodations that do not "significantly compromis[e] prison security or

the levels of service provided to other inmates" fall squarely within the permissible zone; those are the ones that RLUIPA mandates. *Cutter*, 544 U.S. at 720. *Id.* at 725 (internal quotation marks omitted).

5. Petitioner seeks a modest exception to the prison's grooming policy to allow him to grow a half-inch beard in accordance with a tenet of his faith. Respondents have never argued that permitting him to do so would result in state-supported religion or religious favoritism, and there is no reason to think that it might.

Instead, respondents have defended their denial of petitioner's request by, among other things, citing concerns about contraband being hidden in facial hair. But the magistrate judge rightly rejected as "almost preposterous" the suggestion that there is any material difference for that purpose between the half-inch beard that petitioner wishes to grow and the quarter-inch ones that respondents allow for inmates with dermatological conditions. See J.A. 155, 164 (Administrative Directive 98-04.D of Arkansas Department of Correction). Facial-hair density may vary, but even the most hirsute would find it difficult to conceal even something as small as a cell-phone SIM card (see Pet. Br. 32; J.A. 128-129)—much less a knife or other weapon—in a half-inch beard.

Respondents also assert that beards might facilitate escapes because inmates could change their appearance quickly by shaving. But at least 44 jurisdictions accommodate inmates' requests to grow a half-inch beard for religious reasons. Pet. Br. 24-26; see also Dawinder S. Sidhu, *Religious Freedom and Inmate Grooming Standards*, 66 U. Miami L. Rev. 923, 964-72 (2012). If neatly trimmed beards genuinely "compromis[ed] prison security or the levels of ser-

vice provided to other inmates" (*Cutter*, 544 U.S. at 720 (internal quotation marks omitted))—whether by facilitating prison breaks or the smuggling of contraband or by putting inmates, guards, or anyone else at risk in any way—respondents would have had some evidence to offer on that score. That they came forward with nothing but fanciful speculation should end the matter.

6. Of course, the existence of a nonreligious exemption to an otherwise generally applicable, religiously neutral policy—such as the grooming regulation here—does not automatically justify a religious accommodation. In some cases, existing exemptions differ materially in scope, duration, or justification; courts should therefore carefully consider the context of the particular regulatory scheme at issue. Moreover, the Establishment Clause always requires special care to ensure that third parties would not be harmed by requested accommodations (see Part B, *infra*)—even if government is preferentially allocating costs, burdens, and benefits among inmates for reasons unrelated to religion. But here, respondents have offered no compelling—or even minimally plausible—concern for safety, security, or discipline that might justify denying petitioner's request. Nor have they shown that allowing petitioner to grow a short, neatly trimmed beard would result in state-supported religion or an official preference for religion over nonreligion or that it would adversely affect anyone else.

In sum, the Establishment Clause presents no obstacle to accommodation, and respondents do not and cannot meet their burden to show the compelling interest and narrow tailoring required for denying the accommodation under RLUIPA. Petitioner's re-

quest should therefore have been granted, and the Eighth Circuit erred in concluding otherwise.

B. The Establishment Clause Forbids Accommodations That Would Meaningfully Burden Third Parties.

But not every request for an accommodation is so easily resolved. It is therefore critically important that, in deciding this case, the Court remain mindful of the considerations that must always inform decisions under RLUIPA, lest the Court's opinion inadvertently erode the constitutional limitations on permissive accommodation. Were that to happen, the rights and well-being of some inmates might in many instances be sacrificed in order to advance the religious practice of others. That is not what Congress intended in enacting RLUIPA, and it is not a result that the Establishment Clause allows.

1. Accommodation may sometimes lead to impermissible governmental favoritism toward religion.

As this Court has warned, "[a]t some point, accommodation may devolve into 'an unlawful fostering of religion.'" *Cutter*, 544 U.S. at 714 (quoting *Corp. of Presiding Bishop* v. *Amos*, 483 U.S. 327, 334-335 (1987)). That risk may be present whenever a special privilege is afforded to religious adherents, because of the possibility that it will be perceived as favoring religion over nonreligion. But the danger is especially pronounced when the granting of an exception, exemption, or privilege to one group imposes costs or burdens on others. Thus, this Court admonished in *Cutter* that proper application of RLUIPA must always involve "tak[ing] adequate account of the bur-

dens a requested accommodation may impose on nonbeneficiaries." *Id.* at 720.

This requirement follows from the central Establishment Clause concern, and this Court's long-standing recognition, that the right to practice one's faith freely is conditioned by the equal rights of others. The requirement governs not just accommodations that would play favorites among religious denominations, but also those that would impose even purely secular burdens on others. When government discounts or ignores the secular harms that a requested accommodation might inflict on third parties, it may end up infringing the rights and interests of those third parties in order to advance religious practices in which they do not wish to partake. Subordinating the rights of some to the religious choices of others also risks fomenting the religious strife that the Establishment Clause was designed to forestall. Cf. *Van Orden* v. *Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring) (Religion Clauses "seek to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike.").

Enforced underwriting of another's religious exercise is a kind of compelled support or conformity that has no place in our constitutional order. As James Madison put it, our plan of government provides for "the immunity of Religion from civil jurisdiction, *in every case where it does not trespass on private rights* or the public peace." Letter from James Madison to Edward Livingston (July 10, 1822), *reprinted in* 9 The Writings of James Madison 1819-1836, at 98, 100 (Galliard Hunt ed., 1910) (emphasis added).

Thus, this Court has consistently declined to grant exemptions or special privileges to enable religious practice when doing so would impose meaningful burdens on some other identifiable individual. In *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703 (1985), for example, the Court struck down a statute requiring employers to accommodate sabbatarians in all instances, because "the statute [took] no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath." *Id.* at 709. Because the statute favored religious over nonreligious reasons for taking time off, it impermissibly forced coworkers to "take a back seat to the Sabbath observer" instead of maintaining strict governmental neutrality in matters of religion. *Id.* at 710 n.9; cf. *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 66, 80 (1977) (Title VII's reasonable-accommodation provision does not authorize shifting to unionized coworkers with greater seniority the burden of covering for religious observer's requested day off).

Similarly, in *Braunfeld* v. *Brown*, 366 U.S. 599 (1961), the Court denied an exemption from Pennsylvania's Sunday-closing law to orthodox Jews, who were already closing their businesses on Saturday. The plurality reasoned that allowing the shopkeepers "to keep their businesses open on [Sunday] might well provide [them] with an economic advantage over their competitors who must remain closed on that day." *Id.* at 608-609 (plurality op.). In doing so, the plurality noted that the requested exemption might distort religious practice by creating incentives for some business owners to claim religious reasons for closing on "their least profitable day" rather than on their sabbath, and that it might also encourage reli-

gious discrimination in hiring by the exempted businesses. *Id.* at 609.

And in *United States* v. *Lee*, 455 U.S. 252 (1982), the Court refused to exempt an Amish employer from paying his employees' share of social-security taxes because granting that exception would "operate[] to impose the employer's religious faith on the employees" by forcing them to participate in his religiously based dissent. *Id.* at 254 n.1, 261.

To be sure, the Court has occasionally permitted accommodations that might have hypothetical spillover effects—but only when the potential consequences for third parties would be so diffuse and amorphous as to have no meaningful effect on any particular individual. Thus, the Court held that government may exempt houses of worship from property taxes as part of a broad exemption for nonprofit entities (*Walz* v. *Tax Comm'n*, 397 U.S. 664, 673 (1970)), because the public as a whole bore the incidence of the forgone tax revenues—and did so only in the most abstract way—while also sharing in the social benefits of a system that encouraged all nonprofits to flourish. The Court similarly upheld a conscientious-objector exemption from the draft. *Gillette* v. *United States*, 401 U.S. 437, 454-460 (1971). Although in principle the exemption exposed other registrants to an "increased chance of being drafted and forced to risk one's life in battle" (*Kiryas Joel*, 512 U.S. at 725 (Kennedy, J., concurring)), the theoretical burden created by the exemption was general and immeasurably small, given the size of the draft pool and the random selection process employed (see Random Selection for Military Service, Proclamation No. 3945, 34 Fed. Reg. 19,017 (Nov. 29, 1969)).

The only other arguable exception that the Court has recognized to the rule against accommodating religion in ways that burden third parties is in the context of laws affecting church autonomy (which give rise to entirely different concerns). *See Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 132 S. Ct. 694 (2012); *Amos*, 483 U.S. at 327.

In all other circumstances, the Court has approved accommodations—including statutory ones such as those authorized by the Religious Freedom Restoration Act, Pub. L. No. 103-141, codified at 42 U.S.C. §§ 2000bb *et seq.*, and RLUIPA—only when they did not risk "abridg[ing] any other person's religious liberties" or otherwise implicate Establishment Clause concerns in any meaningful way. *Sherbert* v. *Verner*, 374 U.S. 398, 409-410 (1963) (recognizing exemption for Seventh-Day Adventist from unemployment-benefits law that required her to accept work on her Sabbath, where there was no risk that providing the benefits would make her "a nonproductive member of society"); see also, *e.g.*, *Gonzales*, 546 U.S. at 426-427, 435-437 (recognizing exemption from federal drug laws for religious group's ritual use of hallucinogenic tea because, among other things, government failed to show harmful third-party effects of accommodation); *Wisconsin* v. *Yoder*, 406 U.S. 205, 230 (1972) (exempting Amish from truancy laws after eighth grade because accommodation would cause no "harm to the physical or mental health of the child[ren] or to the public safety, peace, order, or welfare"). To do otherwise would be to cross the line from permissible accommodation to impermissible favoritism toward religion.

2. When evaluating inmates' requests for accommodations, courts should consider both the burdens on free exercise and the burdens that accommodation may place on other inmates.

Prisons are home to an amazing diversity of religious beliefs and practices, yet prison officials tightly regulate all aspects of inmates' lives, including access to clergy, religious texts, worship services, and other means and modes of practicing one's faith. See, *e.g.*, *Cutter*, 544 U.S. at 720-721. As explained above (at 4-5, *supra*), inmates face far more intrusive limitations on free exercise than the civilian population experiences. Thus, in many cases, there will appropriately be a greater demand for exemptions inside prison than outside. Indeed, Congress passed RLUIPA specifically to address the substantially greater intrusions on free exercise that occur within the prison walls. See *Cutter*, 544 U.S. at 714-715. Yet the concern for not burdening third parties is no less critical in the prison context.

a. Prisons in the United States are home to unprecedented religious diversity. Although reliable statistics about the religious affiliations of inmates are hard to come by, "in part because the government does not track religion on Census surveys and because state prisons typically fail to track inmates' religious affiliation" (SpearIt, *Religion as Rehabilitation? Reflections on Islam in the Correctional Setting*, 34 Whittier L. Rev. 29, 35 (2012)), the available estimates consistently show greater representation of minority faiths in prison populations than in civilian society. See U.S. Commission on Civil Rights, *Enforcing Religious Freedom in Prison* 14 (2008), http://goo.gl/dDlBTX ("[D]ata from federal and state

prisons suggest that the percentage of those professing non-Christian faiths is higher in prisons than in the non-incarcerated adult population overall.").[2] And the religious diversity is only increasing. See, *e.g.*, Pew Forum, *Religion in Prisons* 50-51 (survey of prison chaplains shows that numbers of practitioners of pagan and earth-based religions, Native American spirituality, Judaism, Islam, and Christianity are all increasing).

b. While that diversity produces many different sorts of requests for religious exemptions from generally applicable prison rules, the conditions of confinement mean that granting an exception for one inmate or group of inmates would sometimes have pronounced negative effects on others. Yet facilitating religious exercise by shifting the costs or burdens onto nonadherents would impermissibly place the State's "power, prestige, and financial support" behind the religious exercise while imposing "coercive pressure" on other inmates to conform in order to enjoy the benefits or avoid the burdens. *Engel v. Vitale*, 370 U.S. 421, 431 (1962). These impermissible effects might occur in a variety of circumstances.

First, the danger is particularly great when the accommodation would afford special privileges to religious observers that would also be highly desirable to other inmates for secular reasons. In *Americans*

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[2] See also *ibid.* (comparing representation of specific minority faiths in prison to that in civilian society); Pew Forum on Religion & Public Life, *U.S. Religious Landscape Survey, Religious Affiliation: Diverse and Dynamic* 10 (Feb. 2008), http://goo.gl/ftJqc0; SpearIt, 34 Whittier L. Rev. at 36-37; Barry A. Kosmin & Ariela Keysar, *American Religious Identification Survey* 9 (Mar. 2009), http://goo.gl/wPdPIk; Pew Forum, *Religion in Prisons*, at 48-49.

United for Separation of Church & State v. *Prison Fellowship Ministries, Inc.*, 509 F.3d 406 (8th Cir. 2007), for example, Iowa had converted a prison's "honor unit" into a unit designated for practicing Christians. This special facility provided "greater privacy than the typical cell" and allowed "more visits from family members and * * * greater access to computers" and other recreational items. *Id.* at 424. Because eligibility for the unit (and hence also the special privileges that it afforded) was based on willingness "to productively participate in a program that is Christian-based," the Eighth Circuit held that the program created unlawful incentives for inmates to convert to Christianity. *Id.* (internal quotation marks omitted).

Second, an accommodation might be inappropriate if granting it would cause dignitary harms to other inmates. Approving an inmate's request to limit contact with other inmates to coreligionists only, for example, or to be segregated from persons of a certain belief system that the inmate dislikes or disagrees with, would constitute official favoritism toward religiously motivated association over other associational interests. See, *e.g.*, *Hamilton* v. *Hernandez*, 500 F. App'x 592, 594 (9th Cir. 2012) (inmate not entitled under RLUIPA to reject cellmates who did not share his practice of House of Yahweh faith). This type of favoritism would also put the state's stamp of approval on discrimination.

Finally, granting a requested accommodation may pose unacceptable risks to the physical safety or well-being of other inmates or guards. Permitting a particular religious practice might, for example, be an unreasonable "drain on prison security's manpower" to oversee the inmates, especially if "unrest

arises in one part of the prison while a * * * ceremony [requiring supervision by guards] is ongoing elsewhere." *Fowler* v. *Crawford*, 534 F.3d 931, 939 (8th Cir. 2008) (noting safety concerns from sweat-lodge ceremony, which would provide inmates with "ready access" to embers, coals, wood, rocks, and shovels in "an enclosed area inaccessible to outside view"); *Indreland* v. *Yellowstone Cnty. Bd. of Commr's*, 693 F. Supp. 2d 1230, 1234 (D. Mont. 2010) (state had legitimate interest in denying inmate's request for Satanic medallion on chain that "could be used to strangle another inmate or officer"). Prison life is marked by the ever-present risk of violence, even without exacerbating that danger by forcing some individuals to sacrifice their freedom of conscience, safety, or quality of life to the religious choices of their fellow inmates.

c. Although prison life may present particular challenges in balancing the accommodation of religious exercise against the harms and burdens to others, the governing principles, and the attendant need for careful evaluation of requests, are no different from those in civilian life.

The Establishment Clause no more licenses accommodations outside prison that impose burdens on others than it does within the prison walls. Indeed, accommodations are more likely to be appropriate in prison than outside because the point of accommodation is to ameliorate government-imposed burdens, not to encourage religious practice. And as the Court explained in *Cutter*, 544 U.S. at 720-721, the sorts of government-imposed burdens on religious exercise that exist in prison are orders of magnitude greater than anything that normally exists elsewhere. See pages 4-5, *supra*. In civilian life, where government-

imposed burdens on religion are the exception rather than the rule, special privileges for religion are far more likely to favor and encourage religion over non-religion or one faith over others. Thus, although accommodations are more likely to be permissible in prison than in civilian life, care must be taken in both contexts to consider the limitations that the Establishment Clause places on accommodations that might adversely affect third parties. An exemption should not subject certain classes of people to the stigma of invidious discrimination, deny them access to public accommodations and services, or impose financial burdens on or strip benefits from them. If it would, "an accommodation may impose a burden on nonadherents so great that it becomes an establishment." *Kiryas Joel*, 512 U.S. at 725 (Kennedy, J., concurring).

* * *

Requests for religious accommodations come in different shapes and sizes. The simplicity of this case should not obscure the fact that the requests must always be evaluated with care to ensure that the Establishment Clause's boundaries are respected, and that fulfilling one inmate's desire for enhanced opportunities to practice his or her faith never becomes a tool for restricting the quality of life of other inmates. Nor should RLUIPA ever become a license to put inmates or guards at risk of physical injury or death, or to strip inmates of rights and privileges in the name of supporting religious beliefs and practices to which they do not subscribe. As the Court observed in *Cutter*, "[s]hould inmate requests * * * impose unjustified burdens on other institutionalized persons," "the facility would be free to resist the im-

position." 544 U.S. at 726. And the Establishment Clause may require it to do so.

CONCLUSION

For the foregoing reasons as well as those stated by petitioner, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 13-6827

IN THE

Supreme Court of the United States

GREGORY HOUSTON HOLT,
A/K/A ABDUL MAALIK MUHAMMAD,
Petitioner,

v.

RAY HOBBS, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION, ET. AL.
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE ANTI-DEFAMATION LEAGUE, THE INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, MUSLIM ADVOCATES, THE QUEENS FEDERATION OF CHURCHES, AND THE SIKH AMERICAN LEGAL DEFENSE AND EDUCATION FUND AS *AMICI CURIAE* SUPPORTING PETITIONER

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BRIEF OF THE ANTI-DEFAMATION LEAGUE, THE INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, MUSLIM ADVOCATES, THE QUEENS FEDERATION OF CHURCHES, AND THE SIKH AMERICAN LEGAL DEFENSE AND EDUCATION FUND AS *AMICI CURIAE* SUPPORTING PETITIONER AND URGING REVERSAL

INTERESTS OF *AMICI CURIAE*

The religious and civil liberties organizations joining this brief represent a diversity of theologies and worldviews. Although their beliefs and missions vary, *amici* are united in supporting institutionalized persons' religious exercise.[1]

The **Anti-Defamation League** ("ADL") was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial, ethnic, and religious prejudice in the United States. Today, ADL is one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. Towards that end, ADL works to oppose government interference, regulation, and entanglement with

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[1] Pursuant to this Court's Rule 37.6, *Amici Curiae* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *Amici Curiae* and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to this Court's Rule 37.3(a), *Amici Curiae* note that, on April 15 and 21, 2014, the parties respectively filed letters with the Clerk of Court reflecting their consent to the filing of *amicus* briefs.

religion, and strives to advance individual religious liberty. At the same time, ADL is actively engaged in monitoring, exposing, and counteracting the threat posed by violence-prone extremists – including certain hate groups that actively organize in prisons. ADL is committed to safeguarding the free exercise rights of all Americans, including prison inmates and others confined to state institutions, yet recognizes the challenge that prison officials face in seeking to accommodate the diverse religious beliefs of the general prison population while protecting personnel, other inmates, and the public. Such a balance can best be achieved by considering specific facts and circumstances, without resort to reflexive speculation or generalizations.

The **International Society for Krishna Consciousness, Inc.** ("ISKCON") is a monotheistic, or Vaishnava, tradition within the broad umbrella of Hindu culture and faith. There are approximately 500 ISKCON temples worldwide, including 50 in the United States. As a religious organization, ISKCON has been subjected to discrimination in the United States and has sought judicial relief based on the Free Exercise Clause. ISKCON has successfully pressed before the Supreme Court its constitutional rights to engage in religious practice. *See Lee v. Int'l Soc'y for Krishna Consciousness, Inc.*, 505 U.S. 830 (1992) (per curiam). Because ISKCON is a religious minority in the United States that often relies on courts to protect its rights, it submits this brief in order to support the rights of religious prisoners to exercise their faiths.

Muslim Advocates, a national legal advocacy and educational organization formed in 2005, works on the

frontlines of civil rights to guarantee freedom and justice for Americans of all faiths. Muslim Advocates advances these objectives through litigation and other legal advocacy, policy engagement, and civic education, and by serving as a legal resource for the American Muslim community, all in order to promote the full and meaningful participation of Muslims in American public life. The issues at stake in this case directly relate to Muslim Advocates' work fighting institutional discrimination against the American Muslim community.

The **Queens Federation of Churches, Inc.** (the "Federation") was organized in 1931 and is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. The Federation and its 390 member congregations are vitally concerned with protecting religious liberty, and have repeatedly appeared as *amicus curiae* for that purpose. The Federation supports RLUIPA's requirement, as applicable to cases such as this one, that the government convincingly prove the compelling interest in any law or regulation that interferes with the free exercise of religion.

The **Sikh American Legal Defense and Education Fund** ("SALDEF") was founded in 1996 and is the oldest national Sikh American civil rights and educational organization. SALDEF is dedicated to empowering Sikh Americans by building dialogue, deepening understanding, promoting civic and political participation, and upholding social justice and religious freedom for all Americans. A religious minority with distinct articles of faith, Sikhs have been in America for over 100 years. Due to their minority status and

religious practice, in addition to suffering overt discrimination, Sikhs are often subject to government regulations prescribing attire and personal appearance that conflict with Sikh religious requirements, such as keeping uncut hair and beards and wearing turbans.

SUMMARY OF ARGUMENT

Ever since Congress enacted the Religious Land Use and Institutionalized Persons Act, lower courts have struggled to apply the statute, often reaching different results on like facts. Although this Court has granted certiorari specifically to address Mr. Holt's request to grow a half-inch beard, the universe of cases implicating prisoners' religious accommodations encompasses other common requests, including those involving diets, personal religious items, worship services, and grooming. Confusion is evident across this universe of cases, leading to unjust and inconsistent results. Thus, Muslim prisoners in the Eighth Circuit have been left to purchase their own halal meals, while Jewish prisoners in the Fifth Circuit are entitled to kosher meals free of charge. African-Hebrew Israelite prisoners in the Seventh Circuit have been forced to cut their hair before appearing in court, while Cahuilla Native American prisoners in the Ninth Circuit are allowed to grow long hair without reprisal.

Underlying this confusion are divergent legal tests the lower courts use when inquiring into each of RLUIPA's two central prongs. First, RLUIPA defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). Despite the clarity and expansiveness of this statutory prescription, some lower courts probe a prisoner's

actions for unfailing adherence to his or her chosen faith, or require a prisoner to prove that a particular practice is rooted in a theological "authority." This judicial dissection of religious belief threatens to deny protection to those who need it most—namely, devotees of unfamiliar, minority or disfavored religions. Second, RLUIPA requires the government to satisfy strict scrutiny by demonstrating that it is imposing a substantial burden in furtherance of a compelling interest, via the least restrictive means. 42 U.S.C. § 2000cc-1(a). Yet, contrary to that prescription, certain lower courts temper their inquiry with improper deference, often crediting unsupported invocations of security concerns by prison officials who have not considered the feasibility of alternatives.

This confusion among the lower courts is undercutting the congressional purpose behind RLUIPA and denying prisoners the religious accommodations that are elsewhere secured as a matter of statutory right. *See generally, Cutter v. Wilkinson*, 544 U.S. 709, 717 n.5 (2005). It is also complicating prison administration, for it is difficult for prison officials to predict with confidence what policies comply. Scott Budzenski, *Tug of War: The Supreme Court, Congress, and the Circuits – The Fifth Circuit's Input on the Struggle to Define a Prisoner's Right to Religious Freedom in* Adkins v. Kaspar, 80 St. J. L. Rev. 1335, 1337 n.15 (2006) ("The inconsistent application of the RLUIPA creates confusion among prison officials as to exactly what conduct amounts to an unconstitutional violation of prisoners' religious rights.").

This Court should take the opportunity in this case to minimize existing disparities and provide clear guidance calculated to promote uniformity among the lower courts. More specifically, *Amici* respectfully urge the Court to clarify how lower courts should inquire into (a) substantial burdens and (b) strict scrutiny. When evaluating substantial burdens, basic inquiry into the sincerity of a prisoner's religious belief should not stray into judicial assessments of whether a particular religious practice is central to or mandated by established orthodoxy—lest courts transgress into the forbidden realms of parsing scripture, choosing between competing doctrines, or consigning a prisoner to the perspective of fellow adherents. It should remain axiomatic that religious individuals are the ultimate authorities on their own religious beliefs. Whenever the government pressures adherents to modify or forsake their sincere beliefs (however novel or rare those beliefs may be), a substantial burden exists.

Once a prisoner establishes a *prima facie* case of substantial burden, strict scrutiny must follow. Accordingly, courts must require prison officials to demonstrate that the government's interests as presented in a particular case are compelling, and that the officials have not only considered less restrictive means but also demonstrated that such means are unavailable or deficient. In cases where prison officials apply inconsistent standards between faiths or genders, reject accommodation requests based on rote commitment to administrative uniformity, or fail to account for policies in comparable institutions, they fail to meet their statutory burden.

Were the Court in this case simply to confirm these basic principles, it would provide clarity that is essential for lower courts, prison officials, and religious prisoners across the United States.

ARGUMENT

I. LOWER COURTS HAVE WANDERED OFF COURSE IN WEIGHING SUBSTANTIAL BURDENS ON RELIGIOUS EXERCISE

Whereas the prescription of RLUIPA is clear and broad regarding the inquiry into substantial burden, lower courts' application of it has often been muddled and cramped. To establish a *prima facie* case under RLUIPA, a prisoner must demonstrate that the government has imposed a substantial burden on his or her religious exercise. 42 U.S.C. § 2000cc-1(a). RLUIPA defines "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A),(B). To avoid doubt, Congress has expressly instructed that the statute should be "construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g).

In evaluating substantial burdens, certain lower courts and prison officials appear to have gone off the statutory track in asking whether a prisoner holds a sincere religious belief. This Court should now reiterate that nothing more than a basic determination of credibility and sincerity is appropriate. Further, when assessing the weight of the burden, lower courts have split regarding the importance that the religious conduct at issue must have to an official faith. This

Court should resolve the split and hold that governmental pressure on prisoners to modify or forsake any sincere religious belief constitutes a substantial burden.

A. Certain Lower Courts Are Improperly Inquiring Into Whether Prisoners' Beliefs Are Orthodox

Because RLUIPA accommodates *religious* exercise, questions may arise as to whether a prisoner's purported belief is in fact religious and sincere. *See Cutter*, 544 U.S. at 725 n.13. This Court has made clear the proper scope of such inquiry under the Free Exercise Clause. *See Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981).

Eddie Thomas was a pacifist Jehovah's Witness whose religious beliefs forbade him from producing armaments. *Id.* at 709. After Thomas was transferred to a department that fabricated tank turrets, he quit his job at a steel foundry. *Id.* at 710. The State of Indiana subsequently denied him unemployment benefits on the ground that he had ceased work voluntarily. *Id.* at 710. Indiana argued that the denial was appropriate because Jehovah's Witness doctrine did not mandate that Thomas quit his job. *See id.* at 715 ("The Indiana court also appears to have given significant weight to the fact that another Jehovah's Witness had no scruples about working on tank turrets; for that other Witness, at least, such work was 'scripturally' acceptable."). In rejecting Indiana's argument, this Court held that Indiana should do no more than assess, with restraint and sensitivity, whether a plaintiff has an honest religious conviction. *Id.* at 715-16.

> [T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

Id. Since *Thomas*, this Court has repeatedly recognized that "courts should refrain from trolling through a person's or institution's religious beliefs." *Mitchell v. Helms*, 530 U.S. 793, 828, (2000) (plurality opinion) (citing *Emp't Div., Dept. of Human Res. of Ore. v. Smith*, 494 U.S. 872, 887 (1990) (collecting cases)).

Despite clear, corresponding instruction from this Court as well as RLUIPA, lower courts continue to test and second-guess the religious beliefs of those who come before them, venturing beyond the narrow question of whether those beliefs are sincere. The various circuits typically appreciate that the inquiry into sincerity is limited "almost exclusively [to] a credibility assessment," *e.g.*, *Moussazadeh v. Tex. Dep't of Criminal Justice*, 703 F.3d 781, 792 (5th Cir. 2012), as corrected (Feb. 20, 2013),[2] but in some instances

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[2] Circuit courts frequently reverse district courts that dismiss prisoners' claims on sincerity grounds. *See, e.g.*, *Tennyson v. Carpenter*, No. 13-1338, 2014 WL 1015908 at *4 (10th Cir. Mar. 18, 2014) (district court improperly determined that a prisoner's participation in a Christian praise choir was not pursuant to a sincere religious belief); *Thompson v. Smeal*, 513 F. App'x 170, 174 (3d Cir. 2013) (district court erred in finding that prisoner did not have a sincere religious belief that Christians should celebrate

circuits, district courts and prison officials struggle to get the message.

Three examples from within the past year are illustrative of the misconceptions that continue to plague prisons and lower courts. First, a Tennessee district court found that two Jewish prisoners were unlikely to establish that their kosher diet requests were sincere, specifically because they "failed to cite *any religious authority* suggesting that failure to eat ceremonially slaughtered meat somehow violates the tenets of their faith." *Roberts v. Schofield*, No. 11-cv-1127, 2014 WL 1028427 at *2 (M.D. Tenn. Mar. 18, 2014) (emphasis added). Second, the Third Circuit held that a Muslim prisoner's request for a diet of halal meat was properly denied at the threshold (*not* at the strict-scrutiny phase) simply because "most Muslims incarcerated within [Pennsylvania] eat the alternative protein diet or the no animal products diet. *Riley v. DeCarlo*, 532 F. App'x 23, 28-29 (3d Cir. 2013). Third, the Florida Department of Corrections enacted an all-encompassing program of religious diets that denied kosher meals to prisoners who failed to satisfy "a process of interviews and follow-up investigation that focuse[d] on the prisoner's knowledge of religious dogma," and went as far as having prison chaplains

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Christmas and Easter communally); *Moussazadeh*, 703 F.3d at 791-92 (district court should not have found that a prisoner was insincere in his Jewish beliefs because he occasionally purchased non-certified-kosher food). *But see Gardner v. Riska*, 444 F. App'x. 353, 355 (11th Cir. 2011) (affirming district court dismissal on sincerity grounds where defendants submitted evidence that inmate purchased non-kosher food).

"measure a prisoner's fidelity to a particular religion by conducting interviews, internet searches, inspecting prison records, and reviewing a prisoner's past religious activities." *United States v. Sec'y, Fla. Dep't of Corr.*, No. 12–cv–22958, 2013 WL 6697786 at *12-13 (S.D. Fla. Dec. 6, 2013). The Southern District of Florida properly enjoined the program, finding that "Defendants' orthodoxy testing strays too far into the realm of religious inquiry, where government officials are forbidden to tread." *Id.* at *13 (internal citations omitted).

Even if later corrected, such recurring governmental intrusion into religious belief and religious doctrine, particularly in reference to "orthodox" religious "authority," occasions serious concern. As this Court explained in *Thomas*, religious beliefs are protected on an individual, not sectarian, basis. *Thomas*, 450 U.S. at 715 ("Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one."). The sincere religious beliefs of adherents of all stripes deserve to be credited by the courts, regardless of whether they may be perceived as fringe.

To be sure, it does not follow from RLUIPA's breadth that any religious assertion by any prisoner is unassailable. *Cf.* 146 Cong. Rec. S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy) (RLUIPA was structured to control frivolous prison litigation without barring meritorious challenges to restrictions on religious liberty). While the sincerity inquiry is narrow, it is also meaningful. Courts may properly scrutinize prisoners' religious protestations where their beliefs suspiciously align

with secular self-interests or are otherwise incredible. For example, the Tenth Circuit has found that a couple accused of marijuana trafficking could not be insulated from criminal prosecution on the basis that they had previously founded the Church of Cognizance, which worships marijuana. *See United States v. Quaintance*, 608 F.3d 717, 718-19 (10th Cir. 2010) (evaluating sincerity under the Religious Freedom Restoration Act). Because the evidence established that the Quaintances used their professed religious beliefs "as cover for secular drug activities," *id.* at 720, including by promising a courier that he would be legally safe to transact a $100,000 marijuana deal provided he signed a church membership pledge, *id.* at 722, the trial court properly found the Quaintances' beliefs to be insincere, *id.* at 723. As *Quaintance* illustrates, narrow inquiry into sincerity will still bar the gate to frivolous RLUIPA claims.

The Court would do much good by reiterating that, under RLUIPA, the government should not sit in judgment of either the orthodoxy of beliefs or the orthopraxy of behaviors. Instead, prison officials and judges should undertake only a narrow assessment—one sufficient to assure themselves that the religious beliefs of the prisoners seeking accommodation are genuine. *See Thomas*, 450 U.S. at 716.

B. Certain Lower Courts Are Improperly Insisting That Prisoners Prove Practices Are Central To Their Faith

While RLUIPA does not itself define the term "substantial burden," Congress intended the term to codify this Court's definition from free exercise cases preceding *Smith*, 494 U.S. at 872. *See* 146 Cong. Rec.

16,700 (2000); *cf. also* 42 U.S.C. § 2000bb. As the Tenth Circuit has aptly summarized (on the basis of this Court's precedents), religious exercise is substantially burdened when a government:

> (1) requires participation in an activity prohibited by a sincerely held religious belief, or
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> (2) prevents participation in conduct motivated by a sincerely held religious belief, or
>
> (3) places substantial pressure on an adherent either not to engage in conduct motivated by a sincerely held religious belief or to engage in conduct contrary to a sincerely held religious belief.

Abdulhaseeb v. Calbone, 600 F.3d 1301, 1315 (10th Cir. 2010) (citing *Thomas,* 450 U.S. at 717-18, and *Sherbert v. Verner,* 374 U.S. 398, 404 (1963)). The Tenth Circuit clarified that not every infringement on a prisoner's religious exercise will be substantial; a prisoner must demonstrate that the government's denial poses more than a mere inconvenience. *Abdulhaseeb*, 600 F.3d at 1316 (internal citations omitted). A majority of circuits have employed variations on the same test in order to identify accommodation denials that pose more than minor impediments to religious practice.[3] Courts

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[3] *See, e.g., LeBaron v. Spencer*, 527 F. App'x 25, 29 (1st Cir. 2013); *Hayes v. Tennessee*, 424 F. App'x 546, 555 (6th Cir. 2011); *Nelson v. Miller*, 570 F.3d 868, 878 (7th Cir. 2009); *Washington v. Klem*, 497 F.3d 272, 280 (3d Cir. 2007); *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006); *Warsoldier v. Woodford*, 418 F.3d 989, 995-96 (9th Cir. 2005); *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004); *McEachin v. McGuinnis*, 357 F.3d 197, 202 (2d Cir. 2004). While "[m]ost of these courts have adopted some form of

routinely determine that prison restrictions on religious diets, possessions, worship, and grooming, impose substantial burdens.

The Tenth Circuit's approach in *Abdulhaseeb* is instructive. There, Madyun Abdulhaseeb requested halal meat consonant with his Islamic faith. *Abdulhaseeb*, 600 F.3d at 1306. Although other Muslims "may find a vegetarian or non-pork diet sufficient to satisfy Islam," the court found that Abdulhaseeb sincerely believed that his religious diet should include halal meats. *Id.* at 1314. In reversing summary judgment for the Oklahoma Department of Corrections, the Tenth Circuit held it reasonable to infer that the prison's "failure to provide a halal diet either prevents Mr. Abdulhaseeb's religious exercise, or, at the least, places substantial pressure on Mr. Abdulhaseeb not to engage in his religious exercise by presenting him with a Hobson's choice—either he eats a non-halal diet in violation of his sincerely held beliefs, or he does not eat." *Id.* at 1316-17.

Other circuits, however, have been more begrudging and approached the inquiry into substantial burden more harshly. According to the Eighth Circuit:

> Substantially burdening one's free exercise of religion means that the regulation must significantly inhibit or constrain conduct or expression that manifests some central tenet of

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the *Sherbert/Thomas* formulation," they have not done so uniformly, and "[t]he result of this practice has been to create several definitions of 'substantial burden,' with minor variations." *Klem*, 497 F.3d at 279.

> a person's individual religious beliefs; must meaningfully curtail a person's ability to express adherence to his or her faith; or must deny a person reasonable opportunities to engage in those activities that are fundamental to a person's religion.

Patel v. U.S. Bureau of Prisons, 515 F.3d 807, 813 (8th Cir. 2008).

Such a formulation of the standard improperly focuses the inquiry into substantial burden on the *centrality* of the belief. But RLUIPA's plain terms should foreclose that result: the text defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious beliefs." 42 U.S.C. § 2000cc-5(7)(A). Nevertheless, the Eleventh Circuit has followed the Eighth Circuit's lead, holding that an Odinist prisoner could not prove he was substantially burdened because he failed to marshal authoritative religious sources demonstrating that his requested items were "fundamental" to his faith. *Smith v. Governor of Ala.*, No. 13-cv-11173, 2014 WL 1303920 at *4-5 (11th Cir. Apr. 2, 2014). The Eighth and Eleventh Circuits' approaches deviate from the framework articulated by this Court, then codified by Congress in RLUIPA. *See Thomas*, 450 U.S. at 718 (government imposes substantial burden when it "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs."); *see also* 42 U.S.C. § 2000cc-5(7)(A).[4]

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[4] The Seventh Circuit has also articulated a heightened approach to substantial burdens that, while different from the

This divergence in standards has inevitably led to inconsistent assessments of substantial burdens, even where similar facts are presented. In *Patel*, the Eighth Circuit held that a Muslim prisoner could not prove a substantial burden on his religious diet, because he had the option of purchasing halal meals from the commissary. *Patel*, 515 F.3d at 814 ("Requiring him to purchase commissary meals does not significantly inhibit, meaningfully curtail, or deny Patel a reasonable opportunity to practice his religion."). Applying the friendlier standard, however, the Fifth Circuit held that a Jewish inmate being "forced to pay for his kosher meals" "substantially burdens his ability to exercise his religious beliefs." *Moussazadeh*, 703 F.3d at 794.

Similarly, the court in *Walls v. Schriro*, No. 05-cv-2259, 2008 WL 544822 at *5 (D. Ariz. Feb. 26, 2008) found a substantial burden could arise from a Hare Krishna prisoner's "sincere belief that eating meals prepared by Hare Krishna devotees" and free from meat, garlic, onions, eggs, and caffeine, "is a requirement of his faith." Less than a year later, a West Virginia court determined that there was no substantial burden for a Hare Krishna inmate to eat meals prepared by those who did not share his faith. *Blake v. Rubenstein*, No. 08–cv–00906, 2009 WL 772924 at *5 (S.D. W.Va. Mar. 17, 2009)

Eighth Circuit's rule, seems unsympathetic to prisoners' interests. *See Koger v. Bryan*, 523 F.3d 789, 798 (7th Cir. 2008) (Noting that a substantial burden is one that "necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . effectively impracticable.").

(distinguishing *Walls* because the inmate there alleged two separate burdens, while in *Blake* the plaintiffs only alleged one).

Lower courts' confusion is not limited to dietary accommodations. District courts similarly fracture as to the religious items prisoners can possess. They have reached different results, for example, regarding the possession of prayer oil. One district court found that denying prayer oil to a Muslim plaintiff constituted a substantial burden because it forced him to "refrain from religiously motivated conduct." *Charles v. Verhagen*, 220 F. Supp. 2d 937, 946 (W.D. Wis. 2002) *aff'd*, 348 F.3d 601 (7th Cir. 2003). Another disagreed and found no substantial burden; while recognizing that prayer oil may be desirable, it deemed oil less than essential to Shia Islam practice. *Sareini v. Burnett*, No. 08-cv-13961, 2011 WL 1303399 at *4 (E.D. Mich. Mar. 31, 2011). A third district court determined that denying prayer oil to a Shetaut Neter adherent did not constitute a substantial burden because he was "able to carry out nearly all other aspects of his religious faith." *See Curry v. Calif. Dep't of Corr.*, No. 09-cv-03408, 2012 WL 968079 at *6-7 (N.D. Cal. Mar. 21, 2012). The *Curry* decision reflects a recurring legal error: lower courts conclude that, so long as a prisoner can practice *some* aspects of his religion, prohibiting *other* aspects does not impose a substantial burden.[5]

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[5] The district court in the instant appeal made this same error. J.A. at 176-77 (refusal to allow Muslim prisoner to grow a beard did not impose a substantial burden, because Mr. Muhammad had been separately provided a prayer rug, a religious advisor, and a religious diet).

RLUIPA, however, protects individual acts of religious exercise, not just holistic religious adherence. *See, e.g.*, *Perez v. Frank*, No. 06-cv-00248, 2007 WL 1101285 at *9 (W.D. Wis. Apr. 11, 2007) ("RLUIPA protects individual acts of piety, regardless of their centrality.").

The discrepancies in legal analysis extend to group worship as well. Multiple courts have found that forbidding group worship imposes substantial burdens. *See, e.g.*, *Phillips v. Ayers*, No. 07-cv-2897, 2010 WL 1947015 at *8 (C.D. Cal. Jan. 14, 2010) (preventing Muslim prisoner from attending Friday Jumah Prayer Service was a substantial burden); *Meyer v. Teslik*, 411 F. Supp. 2d 983, 990 (W.D. Wis. 2006) (Native American's ability to "engage[ ] in silent prayer is not, by itself, justification for forbidding his participation in communal worship."). Other courts, however, have questioned whether group worship is sufficiently critical. *See, e.g.*, *Selby v. Caruso*, No. 09-cv-152, 2010 WL 3892209 at *4 (W.D. Mich. Aug. 20, 2010) *report and recommendation adopted*, 09-cv-152, 2010 WL 3852350 (W.D. Mich. Sept. 29, 2010) (no substantial burden where a Christian prisoner failed to allege that group worship was "central and fundamental" to his religious beliefs). Still others have determined that denying group worship is not a substantial burden, where a prisoner has alternative forms of practice. *See, e.g.*, *Kaufman v. Pugh*, 733 F.3d 692, 697 (7th Cir. 2013) ("There was no evidence that he would be unable to practice atheism effectively without the benefit of a weekly study group."); *Reischauer v. Jones*, No. 06-cv-149, 2009 WL 232625 at *9 (W.D. Mich. Jan. 29, 2009) ("The failure to provide a group service did not prevent Plaintiff from worshiping on his own, from worshiping with a small group of other prisoners, or from

worshiping with a Muslim cleric or religious volunteer."). These are but a few examples among many where lower courts have reached opposing conclusions on similar facts simply because they applied different standards for identifying substantial burdens.

Amici respectfully urge this Court to hold that government imposes a substantial burden upon prisoners' religious exercise whenever it pressures adherents to modify or forsake their religious beliefs, regardless of whether those beliefs are fundamental to their faith. This Court's articulation of that standard would do much to ameliorate the disparities highlighted *supra*.

II. LOWER COURTS HAVE COMPROMISED STRICT SCRUTINY IN DEFERRING TO PRISON ADMINISTRATORS

Once a prisoner demonstrates a substantial burden on his or her religious exercise, the burden of evidence and persuasion shifts to the government to satisfy strict scrutiny. 42 U.S.C. § 2000cc-1(a). Thus, the government must demonstrate "that imposition of the burden on that person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.*

The government cannot, consistent with its statutory burden, obtain judicial deference merely by invoking its general interests in safety and security (which of course are always operative in the prison setting). Rather, the government must demonstrate why it needs to impose each substantial burden at

issue on each individual prisoner in order to further its compelling interests. Moreover, the government must prove that it considered less restrictive means before concluding that none affords a viable alternative for meeting its compelling interests. In scrutinizing such purported proof, courts should examine any inconsistent applications of prison policies. On this point, too, lower courts appear confused and in need of this Court's guidance.

A. Certain Lower Courts Are Improperly Crediting Generalized Prison Interests When Evaluating Whether Specific Burdens Find Compelling Justification

This Court has addressed an analogous statutory prescription regarding compelling governmental interests under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, *et. seq.* *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006) (noting that RLUIPA "allows federal and state prisoners to seek religious accommodations pursuant to the same standard as set forth in RFRA."). *O Centro* explained that statutory regimes calling for strict scrutiny "should be adjudicated in the same manner as constitutionally mandated applications of the test." *Id.* at 430. Strict scrutiny, as codified, "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'— the particular claimant whose sincere exercise of religion is being substantially burdened.'" *Id.* at 430-31. When asserting a compelling interest, the government must do more than offer a "mere invocation of the general characteristics" of "broadly

formulated interests." *Id.* at 431, 439. Instead, the statute calls for a "case-by-case determination of the question, sensitive to the facts of each particular claim." *Id.* at 431 (quoting *Smith*, 494 U.S. at 899 (O'Connor, J., concurring)). At the same time, the case-by-case inquiry under RLUIPA should proceed with "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." *Cutter*, 544 U.S. at 722-23.

The Tenth Circuit recently applied strict scrutiny in the prison context consistent with this Court's instructions. *Yellowbear v. Lampert*, 741 F.3d 48, 58 (10th Cir. 2014). Andrew Yellowbear, a member of the Northern Arapaho Tribe, sought to access the prison's existing sweat lodge for purposes of his religious exercise. *Id.* at 53. The prison refused to provide him with any access, citing safety and cost concerns. *Id.* The Tenth Circuit rejected the prison's "abstract" concerns, noting that counsel's argument "about the 'inherent dangers' of sweat lodges finds precisely no support" in the evidence proffered below. *Id.* at 58. The prison also offered no evidence of actual costs, prompting the Tenth Circuit to explain that strict scrutiny cannot "be satisfied by the government's bare say-so." *Id.* at 59. While acknowledging that prison officials may receive deference once they set forth detailed record evidence supporting their positions, the Tenth Circuit held that "prison officials may [not] declare a compelling governmental interest by fiat." *Id.* at 59. Particularly where prison officials daily undertook the same security procedures for inmates'

medical needs that they eschewed for inmates' religious practice, they failed to establish a compelling interest. *Id.* at 60.[6]

By contrast, the Eighth Circuit deferred generously when affirming a Missouri prison's refusal to provide a sweat lodge for a Cherokee inmate. *Fowler v. Crawford*, 534 F.3d 931, 933 (8th Cir. 2008). The Eighth Circuit announced that "A prison's interest in order and security is always compelling." *Id.* at 939. After examining the evidence, the Eighth Circuit stated that the prison officials had "exercised their discretion and determined that a sweat lodge at [the prison] jeopardizes prison safety and security to an unacceptable degree. This is precisely the exercise of discretion to which RLUIPA requires us to defer." *Id.* at 943. Whatever the state of the record in that case, the Eighth Circuit's legal view of "required deference" and interests that are "always compelling" seems out of place in the context of RLUIPA and its call for strict scrutiny. What is more, since the *Fowler* case, the Eighth Circuit and district courts within it have granted near-automatic deference to prison officials'

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[6] Other circuits have also strictly analyzed prison assertions of compelling interests. *See, e.g.*, *Moussazadeh*, 703 F.3d at 794 (Texas prison failed to link its interests in security and cost control to refusing to provide a Jewish man with kosher food); *Klem*, 497 F.3d at 284 (Pennsylvania prison did not have a compelling interest in order or safety when it barred a Children of the Sun Church practitioner from possessing more than ten books at any time); *Lovelace*, 472 F.3d at 190 (Court refused to "rubber stamp" a Virginia prison's "superficial" explanation as to why banning a Nation of Islam adherent's Ramadan observance fulfilled a compelling interest).

claims of compelling interests.[7] *See, e.g., Singson v. Norris*, 553 F.3d 660, 662-63 (8th Cir. 2009) (denying a Wiccan access to tarot cards in his cell because of deference to prison's assertions of safety and security); *Jihad v. Fabian*, No. 09-cv-1604, 2011 WL 1641767 (D. Minn. May 2, 2011) (refusing to allow Muslim to pray five times a day outside his cell, away from the toilet, due to deference to institutional security). Indeed, the Eighth Circuit's liberal deference is manifest in this case. *See* J.A. at 184-87.[8]

Differences over deference have translated to contrasting rulings regarding accommodations owed to prisoners who adhere to the Nation of Gods and Earth ("NGE"), a religion that formed during the 1960s Black Muslim movement and shares its roots with the Nation of Islam. *See Marria v. Broaddus*, No. 97-cv-8297, 2003 WL 21782633 at *5 (S.D.N.Y. July 31, 2003).

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[7] A different panel of the Eighth Circuit recently pushed back against this acquiescence to prison officials, finding that South Dakota failed to satisfy strict scrutiny in banning all tobacco use by Lakota Sioux prisoners. *Native Am. Council of Tribes v. Weber*, No. 13-1401 and 13-2745, 2014 WL 1644130 at *7 (8th Cir. Apr. 25, 2014) (Bright, J.).

[8] The Eleventh and Fifth Circuits have similarly deferred to stated security concerns in the prison context. *See, e.g., Knight v. Thompson*, 723 F.3d 1275, 1284 (11th Cir. 2013), *petition for cert. filed* No. 13-955, 2014 WL 546539 (Feb. 6, 2014) (forbidding Native American from growing long hair furthered compelling interest in Alabama prison security, discipline, hygiene, and safety); *Thunderhorse v. Pierce*, 364 F. App'x 141, 146 (5th Cir. 2010) (forbidding Native American Shaman from growing long hair furthered compelling interest in Texas prison security).

Lower courts have split as to whether NGE is entitled to *any* religious accommodations under RLUIPA.

In the *Marria* case, NGE member Marria brought suit under RLUIPA to challenge the New York Department of Corrections' complete ban on all NGE gatherings, fasting, literature, and other materials. *Id.* at *4-5. After determining that plaintiff held sincere religious beliefs, *id.* at *12, and that those beliefs had been substantially burdened, *id.* at *13-14, the district court shifted the burden to New York to satisfy strict scrutiny, *id.* at *14. At that stage, although the court agreed with New York that prison safety, security, and order are compelling interests generally, it held that the prison had failed to prove that it had a compelling interest specifically in designating NGE as a security threat and banning all religious activities and literature. *Id.* at *14-18. The court refused to "abdicate its role" in applying strict scrutiny, refused to allow the prison to "merely brandish the words 'security' and 'safety'", and refused to defer to the prison's "*post hoc* justifications." *Id.* at *14. The court ordered the prison to provide plaintiff with the requested NGE literature, and remanded for the prison to appropriately tailor its provision of the requested religious meetings, fasting schedules, and other accommodations. *Id.* at *19-21.

Earlier this year, however, a Virginia district court reached the opposite result: it deferred to the prison's classification of NGE as a gang, and upheld a ban on NGE meetings, literature, and other materials. *Coward v. Jabe*, No. 10-cv-147, 2014 WL 932514 at *1 (E.D. Va. Mar. 10, 2014). The court assumed without deciding that NGE constituted a religion, *id.* at *4, but

then deferred to the prison's assessment that NGE "poses a threat to prison safety," *id.* at *5. Although the plaintiff presented affidavits from NGE adherents attesting that the faith did not condone violence or racism, the court ruled that a complete ban was justified because prison officials had established that *some* NGE members engaged in those activities. *Id.* at *5. This stands in direct contrast to *Marria*, where the court acknowledged that some members of the NGE faith "have committed crimes or otherwise violated prison regulations" before adding that "Catholics, Protestants, Jews, Muslims, NOI, etc. likewise violate prison regulations . . but no one would suggest that such facts preclude the classification of these recognized groups as religions deserving of First Amendment protection." *Marria*, 2003 WL 21782633 at *17.

Consistency commends that lower courts take the same strict approach to scrutiny under RLUIPA. This means that prison officials should be required to prove, with record evidence, their compelling interest in applying the specific restriction under challenge against the specific prisoner who is burdened. A prison must demonstrate that its interest is compelling when applied "to the person," not just in the abstract. 42 U.S.C. §2000cc-1(a). In *O Centro*, for example, the government failed to demonstrate that it had compelling interests in specifically preventing a 130-member branch of a Brazilian Christian Spiritist sect from importing the controlled substance *hoasca* for religious use. *O Centro*, 546 U.S. at 437. Just as the federal government cannot invoke the broad characteristics of controlled substances to justify a specific ban on sacramental use by a single sect, prison

authorities cannot invoke the broad requirements of prison security to justify individual denials of religious accommodations. Instead, prisons must demonstrate that their interest is compelling when applied to "the particular claimant whose sincere exercise of religion is being substantially burdened." *Id.* at 430-31.

Prisons that invoke general interests as compelling, without tying the application of each interest to each specific prisoner and accommodation, fail to satisfy RLUIPA's strict scrutiny. *Amici* respectfully urge this Court to confirm as much.

B. Certain Lower Courts Are Excusing Prison Officials From Considering And Refuting Less Restrictive Policies Operative Elsewhere

Finally, strict scrutiny requires the government to link any compelling interest to its specific, chosen means for achieving it. *O Centro*, 546 U.S. at 430-31 (2006). RLUIPA's "least restrictive means" standard requires the government to show that there are "no alternative forms of regulation" that would fulfill the state's compelling interest. *Sherbert*, 374 U.S. at 407. "[I]f a less restrictive means is available for the Government to achieve its goals, the Government must use it." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 815 (2000). To meet this aspect of its burden, the government must consider plausible alternatives, and also demonstrate "that the alternative[s] [would] be ineffective to achieve its goals." *Id.* at 816.

The Ninth Circuit has provided an instructive assessment of a prison's proof of least restrictive means. *Warsoldier*, 418 F.3d at 989. Billy Soza

Warsoldier, a Cahuilla Native American, followed a religious practice of cutting his hair only upon the death of a loved one. *Id.* at 991-92. He had not cut his hair since his father's death, twenty-five years earlier. *Id.* at 992. While he was incarcerated, the prison had a policy forbidding male inmates from growing their hair longer than three inches. *Id.* After Warsoldier refused to cut his hair, he was confined to his cell, prohibited from using the main yard for recreation, removed from his position with an Inmate Advisory Council, and stripped of preexisting privileges. *Id.* The Ninth Circuit found that the three-inch policy and the resulting series of punishments imposed a substantial burden on Warsoldier because they were designed "to coerce him into compliance" and pressured him "to abandon [his] religious beliefs by cutting [his] hair." *Id.* at 995-96.

Once the burden shifted to the government to satisfy strict scrutiny, the availability of a less-restrictive alternative proved dispositive in favor of Warsoldier. As the court noted, the prison could not "meet its burden to prove least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Id.* at 999.[9]

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[9] Other circuits require that the government consider alternatives in order to satisfy strict scrutiny under RLUIPA. *See, e.g.*, *Yellowbear*, 741 F.3d at 62 (government failed to refute plaintiff's suggested alternatives that would permit him to attend sweat lodge); *Couch v. Jabe*, 679 F.3d 197, 203 (4th Cir. 2012) (prison had less-restrictive alternative short of forbidding Sunni Muslim from growing one-eighth inch beard); *Jova v. Smith*, 582 F.3d 410, 416-17 (2d Cir. 2009) (New York prison carefully

Although Warsoldier had proposed a religious exemption to the hair-length policy as a less restrictive means, the prison asserted that it "must enforce the grooming policies upon all inmates regardless of their religious convictions." *Id.* The Ninth Circuit held otherwise after comparing California's assertion against the established policy of the Federal Bureau of Prisons, which does not regulate hair-lengths yet meets "their indistinguishable interests without infringing on their inmates' right to freely exercise their religious beliefs." *Id.* at 1000. Further observing that female inmates may grow longer hair, the Ninth Circuit found that California's failure to explain the differential treatment established "that the hair length restriction is not the least restrictive means to achieve the same compelling interests." *Id.* at 1000-01. Thus, evidence of policies and practices in effect elsewhere was important to the Ninth Circuit in assessing the availability of a less-restrictive alternative for the prison at issue.

By contrast, other circuits have brushed aside inconsistencies, granted unwarranted deference, and shifted the burden of proof back to inmates when assessing less restrictive alternatives. The Eleventh

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considered alternatives in prohibiting Tulukeesh adherents from engaging in martial arts sparring, but failed to prove less restrictive alternatives to dietary accommodations); *Klem*, 497 F.3d at 284 (Pennsylvania prison had less-restrictive alternatives short of limiting Children of the Sun Church practitioner to ten books in his cell); *Spratt v. R.I. Dep't Of Corr.*, 482 F.3d 33, 41 (1st Cir. 2007) (Rhode Island prison offered no evidence that it had considered less restrictive alternatives to a complete ban on preaching by a Christian inmate).

Circuit recently addressed *Warsoldier's* exact issue—a request to accommodate the religious faith of Native American prisoners by relaxing insistence upon short hair. *Knight*, 723 F.3d at 1276-77.[10] In so doing, the Eleventh Circuit expressly rejected *Warsoldier's* legal analysis and held that Alabama prison administrators need not actually consider and reject less-restrictive alternatives. *Id.* at 1285-86. Although presented with evidence that other jurisdictions allowed prisoners to grow long hair, and that Alabama itself allowed female inmates to do so, the Eleventh Circuit credited the state's position that no less-restrictive alternatives were available. *Id.* at 1286. That seems inconsistent with this Court's guidance, especially to the extent that Alabama's female prisoners are permitted to grow their hair long, for a regulation "cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (zoning ordinance that forbade Santeria animal slaughter, but not commercial animal slaughter, was not narrowly tailored to fulfill a compelling interest) (internal citations omitted).

Similarly, the Sixth Circuit shifted the burden of proof back to the prisoner in holding it was permissible

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[10] Growing long hair as a religious practice is not limited to Native Americans or Nazirites (*see infra*). The Sikh practice of *kesh* likewise forbids cutting hair or beards. *See generally*, Brief of *Amicus Curiae* The Sikh Coalition, No. 13-955 (Mar. 13, 2014) (supporting the pending certiorari petition in *Knight v. Thompson*).

for Ohio prison officials to deny a religious hair-length exemption. *Hoevenaar v. Lazaroff*, 422 F.3d 366 (6th Cir. 2005). Hoevenaar was a Cherokee Native American who wished to maintain a kouplock, a two inch by two inch section of hair that is grown longer than the rest. *Id.* at 366-67. The Ohio district court had ruled that the government failed to prove that prison security would be compromised, because (i) religious hair-length exemptions had previously been permitted without incident and (ii) Ohio prisons were simultaneously allowing women to grow long hair. *Id.* at 369. The Sixth Circuit reversed, characterizing the district court as "improperly substitut[ing] its judgment for that of prison officials." *Id.* at 370. The Circuit then held that, once prison officials offer justification for a regulation, "the courts *must defer* to the expert judgment of the prison officials unless the prisoner proves by substantial evidence that the officials have exaggerated their response to security considerations." *Id.* at 370 (internal citations omitted, emphasis added). The Sixth Circuit's standard thus requires the prisoner to prove why even perfunctory government evidence should not carry the day. Instead of applying RLUIPA's statutory strict scrutiny through to the government's ultimate burden of persuasion, *see* 42 U.S.C. § 2000cc-5(2), the Sixth Circuit's standard threatens to regress towards rational-basis review – the same review that governs the Free Exercise Clause, *see Turner v. Safley*, 482 U.S. 78, 87-89 (1987), and Congress passed RLUIPA specifically to ratchet up.

The Seventh Circuit has also watered down the inquiry into least restrictive means. *See Lewis v. Sternes*, 712 F.3d 1083 (7th Cir. 2013). In *Lewis*, Peter

Lewis, an Illinois prison inmate, belonged to the African Hebrew Israelites of Jerusalem. *Id.* at 1083-84. As part of his religious practice, Lewis took the Nazirite vow to never cut his hair (per the lessons of the Biblical figure Samson). *Id.* at 1084. The Illinois prison determined that Lewis's uncut hair constituted a security risk because it had formed into dreadlocks and could not be readily searched for contraband. *Id.* Knowing Lewis faced an upcoming court date in another case, the prison gave him two options: Lewis could either cut his hair and attend court, or else he could refuse a haircut, be placed in segregation, and miss his court appearance. *Id.* Lewis relented in getting a haircut, then filed an RLUIPA lawsuit. *Id.* at 1084-85.

In rejecting Lewis's request for a religious dreadlock exemption, the Seventh Circuit faulted him for presenting no evidence that the prison's "need to regulate hair length" was "not great enough to warrant interference with his religious observance." *Id.* at 1085. The Seventh Circuit affirmed the district court's finding that, "bearing in mind the level of deference this court is required to give to prison officials on security matters," no alternative existed because Lewis had not proved "that a manual search of his hair would have been as effective at furthering the prison's security interest." *Lewis v. Snyder*, No. 04-cv-50160, 2011 WL 4036140 at *5 (N.D. Ill. Sept. 12, 2011). Without using the words "less restrictive means," the Seventh Circuit rejected Lewis' evidence that an inmate in his same facility went unpunished for wearing dreadlocks, and that another Illinois prison allowed dreadlocks. *Lewis*, 712 F.3d at 1085-86. Instead, the Seventh Circuit faulted Lewis for failing to

prove that "the prison's security concerns are outweighed" by his "sincere religious observance." *Id.* at 1087.[11] Like the Sixth Circuit in *Hoevenaar*, the Seventh Circuit improperly shifted the burden to the prisoner.[12] The Eighth Circuit required the same shift in this case. *See* J.A. at 186 (prisoner must offer substantial evidence that prison's response was "exaggerated" to override deference).

Under RLUIPA, however, it should not be the prisoner's duty to demonstrate that his religious exercise should trump regulation; to the contrary, it falls upon the prison to reverse what is otherwise the operative rule (*i.e.*, individualized religious accommodation trumps general prison interests and policies). A prison can justify a substantial burden on religious exercise only by satisfying strict scrutiny. *See* 42 U.S.C. § 2000cc-5(2) ("Demonstrate" means to meet

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[11] *See also Williams v. Snyder*, 367 F. App'x 679, 683 (7th Cir. 2010) (deferring to prison's judgment that sanctioning Rastafarian for violating a ban on dreadlocks was least restrictive means of fulfilling compelling security interest).

[12] A district court in Louisiana recently reached the opposite result on similar facts by focusing on less-restrictive means. *See Williams v. Champagne*, No. 11-160, 2014 WL 1365940 (E.D. La. Apr. 6, 2014). The court determined that although the prison officials had proved that enforcing a short-hair policy was "*one way* of addressing safety and hygiene concerns," they had not proved it was the *least restrictive* way. *Id.* at *4. Indeed, when the Rastafarian inmate offered plausible alternatives, the prison had no reply. *Id.* With only "bare assertions" of health and security in the record, the prison was not entitled to summary judgment dismissing William's RLUIPA claim. *Id.*

"the burdens of going forward with the evidence and of persuasion.").

Congress passed RLUIPA for the sake of protecting religious exercise by mandating individual exceptions to generally applicable laws. *Cf. O Centro*, 546 U.S. at 434 (permitting judicial exemptions under RFRA). The express, statutory insistence upon strict scrutiny, including searching consideration of less restrictive alternatives, is to be policed by the judiciary. Yet something is getting garbled in translation when applied by lower courts. Correct application of the statute requires courts to evaluate less restrictive means with an eye towards prisons' internal consistency and comparable institutions' practices. For a prison to satisfy RLUIPA's strict scrutiny, it must demonstrate why alternative means cannot fulfill its compelling interests.

Amici certainly credit prison interests in health, safety, and security, and agree that policies necessary to secure those interests should remain in place. Our respectful submission is simply that courts should apply uniform, rigorous standards before accepting that prison officials have properly denied a prisoner of sincere belief the religious accommodation he or she seeks.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-6827

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STATEMENT OF INTEREST[1]

Former Corrections Officials John Clark, Justin Jones, Chase Riveland, Phil Stanley, and Eldon Vail

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae*, its members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief in letters lodged with the Clerk.

respectfully submit this brief as amici curiae in support of Petitioner Gregory Houston Holt a/k/a Abdul Maalik Muhammad.

John Clark served as Assistant Director of the Federal Bureau of Prisons from 1991 to 1997. From 1989 to 1991 he served as Warden of USP-Marion, the highest security federal prison in the United States. He has over 30 years of experience in the field of corrections.

Justin Jones served as Director of the Oklahoma Department of Corrections from 2005 to 2013. He has more than 35 years of experience in the field of corrections.

Chase Riveland served as Executive Director of the Colorado Department of Corrections from 1983 to 1986 and as Secretary of the Washington State Department of Corrections from 1986 to 1997. He has 39 years of professional, management, and administrative experience in the field of corrections.

Phil Stanley served as Commissioner of the New Hampshire Department of Corrections from 2000 to 2003. He has 35 years of experience in the field of corrections.

Eldon Vail served as Secretary of the Washington State Department of Corrections from 2007 to 2011. He has over 30 years of experience in the field of corrections.

As former corrections officials, *amici* have first-hand experience administering secure prisons while accommodating religious exercise, as now codified in section 3 of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1,

and the analogous provisions of the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1. It is *amici*'s view that allowing the requested religious exemption from restrictive grooming policies would serve to *enhance* prison security, not to diminish it, and that prison officials are unlikely to satisfy RLUIPA's strict scrutiny inquiry when rejecting what has proven to be a successful religious accommodation in other comparable institutions or for other comparable prisoners, both as a matter of law and sound penal policy. We respectfully submit this brief to set forth the basis for those views.[2]

SUMMARY OF ARGUMENT

The government may not impose a substantial burden on the religious exercise of a prisoner unless doing so is necessary to a compelling state interest that cannot be furthered by less restrictive means. 42 U.S.C. § 2000cc-1. There is no dispute in this case that the hair grooming policies enforced by Arkansas corrections officials impose a substantial burden on the religious rights of the prisoner plaintiffs. There is also no dispute that the hair grooming policies in the Arkansas prison system are more restrictive than those in place in the overwhelming majority of prison systems across the country. And there is no dispute that prison officials in Arkansas never reviewed other states' less restrictive policies, never considered whether they could be implemented in

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[2] Counsel affiliated with the ACLU also serve as co-counsel for Petitioners in *Knight* v. *Thompson*, 723 F.3d 1275 (11th Cir. 2013), *petition for cert. filed*, 82 U.S.L.W. 3476 (U.S. Feb. 6, 2014) (No. 13-955), which raises issues similar to those presented in this case.

Arkansas without compromising prison security, and never demonstrated that they could not. The language, history, and purpose of RLUIPA require more before rejecting a requested religious accommodation.

Petitioners have made all these points, and *amici* will not repeat them at length. *Amici's* focus in this brief is to explain that the prison security claims made by Respondents are inconsistent with sound penal policy, contradicted by experience, and not entitled to the deference they were given by the courts below.

First, accommodating individual religious practice can have a demonstrably *positive* effect on individual adjustment and rehabilitation and, as a result, on the prison security environment as a whole. Short-sighted and unsupported policies that impede individual religious practice in the name of prison security are more likely to have the opposite effect. In *amici's* experience, allowing latitude in prisoner religious exercise meaningfully contributes to the prison security environment.

Second, perceptions of fairness and legitimacy play a critical role in contributing to prison security, and are likewise undermined when prison authorities enforce rules that are perceived by prisoners to be arbitrary or unreasoned. Because every prison requires the cooperation of its incarcerated inhabitants to maintain a stable environment, fairness in the exercise of prison authority promotes legitimacy and encourages self-regulation. In the context of RLUIPA, fairness takes on an unmistakably substantive character, where the state's burden

of "demonstrating" a compelling interest that cannot be furthered by any less restrictive means requires that it not only consider the less restrictive policies of other prison jurisdictions, but establish with evidence that these other policies could not work in the state's own prison system as to the particular prisoner practitioner. The arbitrary determinations of the sort at issue here do not enhance security; they undermine it.

The Eighth Circuit's decision should be reversed.

ARGUMENT

I. THE RELIGIOUS ACCOMMODATION SOUGHT BY PETITIONER POSES NO MATERIAL SECURITY RISK.

Respondents have failed to demonstrate that the requested religious accommodation here would pose a material risk to prison security when the overwhelming majority of prison systems around the country have concluded otherwise, and where Respondents did not demonstrate that conditions in Arkansas call for a different result as to Petitioner. RLUIPA requires more than the *ipse dixit* invocation of prison security before prison officials can impose a substantial burden on the religious rights of prisoners in their care.

A. A Broad Federal And State Consensus Exists That Religious Grooming Exemptions Do Not Implicate Prison Security.

Amici collectively have over 169 years of experience as corrections professionals. That experience, and the experience of their colleagues across the country, has led to a broad consensus among federal and state

correction officials that restrictive grooming policies that fail to permit religious accommodation are not required for reasons of prison security. All told, Petitioner's beard would have been allowed in at least 43 of the 52 prison jurisdictions in this country (whether outright or as a religious exemption). *See* Dawinder S. Sidhu, *Religious Freedom and Inmate Grooming Standards*, 66 U. Miami L. Rev. 923, 964-72 (2012) (describing the prisoner grooming policies of all U.S. prison jurisdictions).[3]

Nor have Respondents demonstrated that the policies in place in the vast majority of states presented any meaningful security problems. In fact, for the most part Respondents appear not to have been *aware* of other states' policies. Petitioner cited cases from California, *Mayweathers* v. *Terhune*, 328 F. Supp. 2d 1086 (E.D. Cal. 2004); Arizona, *Luckette* v. *Lewis*, 883 F. Supp. 471 (D. Ariz. 1995), and New York, *Fromer* v. *Scully*, 874 F. 2d 69 (2d Cir. 1989), granting or upholding religious exemptions to prison beard restrictions under RLUIPA and the First Amendment, respectively. Petitioner also presented evidence that New York requires two identification

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[3] Thirty-eight states, the United States, and the District of Columbia permit beards with no restriction on length for all prisoners or for prisoners with religious motivation; Indiana, Idaho and Mississippi limit beards to 1½, ½ and ½ inches, respectively. *See* Pet. Br. 24-25. Moreover, as a result of appellate court decisions, two of the nine states that would not permit Petitioner's requested ½-inch beard recently changed their policies to provide requested religious exemptions of ¼-inch beards. *See Garner* v. *Kennedy*, 713 F.3d 237 (5th Cir. 2013) (Texas); *Couch* v. *Jabe*, 679 F.3d 197 (4th Cir. 2012) (Virginia).

photos of bearded prisoners (to protect against the concern that a bearded prisoner can quickly change his appearance by shaving). *See* J.A. 69.[4]

Respondents' answer to this evidence was telling: their witnesses testified that they had not *considered* the less restrictive policies in other states, were not aware of what policies other states were implementing, had not considered specific means to address any change-in-appearance risk allegedly presented by beards, and speculated that these other states must not share Arkansas's goals regarding "safety" and "security" and "prevent[ing]" contraband "from

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[4] The trial record in *Knight* v. *Thompson*, *see supra* n.2, contains an extensive factual development of the less restrictive grooming policies in other jurisdictions, and the various means used by other prison systems to reconcile religious accommodations with asserted security concerns in individual cases in contrast to the blanket denial imposed by Alabama and Arkansas. *See generally* Plfs. Trial Exs. 22-55, *Knight* v. *Thompson*, Civ. Nos. 2:93-cv1404-WHA, 2:96-cv554-WHA (hereinafter "*Knight* Trial Exs."). For example, the record in *Knight* reflects that some states consider whether the prisoner requesting a religious exemption or otherwise seeking to retain a beard or long hair has a history of grooming-related misconduct (e.g., escape attempts, attempts to conceal identity). *See, e.g.*, *id.* Ex. 22 at 3, 5 (New Mexico, Ohio). Other states require the prisoner to obtain a new identification photograph when the prisoner's appearance has changed as a result of grooming preferences. *See, e.g.*, *Knight id.* at 7 (Wyoming), 24 at 1 (Alaska), 32 at 1 (Illinois), 33 at 7 (Indiana). Others impose restrictive standards on an individualized basis "[a]t any time concealment of contraband is detected in the hair." *Id.* Ex. 34 at 4 (Iowa).

coming into our institutions." J.A. 132; *see* J.A. 101-102, 105-106, 110-111, 119. Respondents offered no empirical basis to meaningfully and reliably distinguish Arkansas's correctional facilities from the 43 jurisdictions that permit the exemptions at issue.[5] *Compare Garner* v. *Kennedy*, 713 F.3d 237, 247 (5th Cir. 2013) ("We also find it persuasive that prison systems that are comparable in size to Texas's—California and the Federal Bureau of Prisons—allow their inmates to grow beards * * * *"). This Court need not and should not credit Arkansas's conclusory justification for its restrictive policies that other states must be less concerned with prison "safety and security." J.A. 132.

B. Respondents Have Not Demonstrated That The Denial of the Requested Exemption Is The Least Restrictive Means Of Furthering A Compelling Interest.

RLUIPA prohibits the government from imposing "a substantial burden on the religious exercise of a person residing in or confined to an institution," 42 U.S.C. § 2000cc-1(a), "unless the government demonstrates that imposition of the burden on that person is in furtherance of a compelling governmental

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[5] The testimony offered by respondents in *Knight* regarding less restrictive hair length policies in 40 of the 52 U.S. prison jurisdictions was almost identical. *See* Pet. for Cert., *Knight* v. *Thompson*, No. 13-955 (U.S. Feb. 6, 2014), at 5-6 (Alabama witnesses, including its retained expert, "never * * * reviewed," were "not aware,' and 'never examined or looked into' " other states' policies); *Knight* v. *Thompson*, 723 F.3d at 1278 & n.2 (40 of 52 prison jurisdictions would have permitted requested exemption).

interest" and "is the least restrictive means of furthering that compelling governmental interest." *Id.* The key is "demonstrates": The government is put to its proof under RLUIPA, and must "meet the burdens of going forward with the evidence and of persuasion." 42 U.S.C. 2000cc-5(2).

The Eighth Circuit concluded, however, that deference to Arkansas's prison officials was warranted *in the absence of* "substantial evidence in [the] record indicating that [their] response * * * to security concerns [was] exaggerated," and notwithstanding that the Petitioner had come forward with evidence of "prison policies from other jurisdictions" applying "less restrictive means of achieving prison safety and security." J.A. 186-87.[6]

But RLUIPA requires more than just blind deference in the "absence" of evidence supporting a restriction. As this Court has recognized, Congress adopted strict scrutiny in RLUIPA specifically to redress the "'arbitrary' barriers [that] impeded institutionalized persons' religious exercise" and that had prevailed under the prior, more deferential rational basis standard. *Cutter* v. *Wilkinson*, 544 U.S. 709, 716 (2005) (quoting 146 Cong. Rec. 16,698, 16,699 (2000) (joint statement of Sens. Hatch and Kennedy) (the "Joint Statement")). That is why the statute requires prison officials to "*demonstrate,* and not just assert, that the rule at issue is the least

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[6] The Eleventh Circuit committed the same error in *Knight*, concluding that the evidence of less restrictive policies in the "strong majority" of other jurisdictions merely signified that those "other jurisdictions * * * ha[d] elected to absorb th[e] risks." *See* 723 F.3d at 1278, 1286.

restrictive means of achieving a compelling governmental interest." *O'Bryan* v. *Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003) (examining analogous statutory language under RFRA) (emphasis added).

As the First Circuit has put it, "conclusory statements about the need to protect inmate security" do not meet a governmental entity's burden under RLUIPA. *Spratt* v. *Rhode Island Dep't of Corr.*, 482 F.3d 33, 40 n.10 (1st Cir. 2007). Nor do conclusory statements about the efficacy of other, less restrictive alternatives. For if strict scrutiny means anything, it requires at minimum "some consideration [of] less restrictive alternatives" adopted by other jurisdictions, *Couch* v. *Jabe*, 679 F.3d 197, 203 (4th Cir. 2012), *accompanied by* some "explanation * * * of significant differences" that "render[ed]" the less restrictive policies "unworkable," *Spratt*, 482 F.3d at 42. *Accord Warsoldier* v. *Woodford*, 418 F.3d 989, 999 (9th Cir. 2005). In other words, the restrictive policy must be supported by "reasoned judgment" and demonstrated by facts, and not empty assertions or implausible, *post hoc* rationalizations. *Spratt* 482 F.3d at 42 n.14.

As this Court has observed, RLUIPA's legislative history alludes to the historical practice of according "due deference to the experience and expertise of prison and jail administrators." *Cutter*, 544 U.S. at 723 (citations and quotation marks omitted). But *due* deference is not *reflexive* deference, and no such "experience and expertise" was exhibited by Respondents here. And in any event, "due deference" also cannot supplant RLUIPA's explicit textual requirement that the state "*demonstrate*[] that imposition of the burden on that person is in fur-

therance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a) (emphasis added). A state cannot "demonstrate" that it has furthered a compelling governmental interest via the least restrictive means without "consider[ing]" the less restrictive policies adopted by other jurisdictions. The absence of consideration is fatal. But mere consideration is also insufficient under the statute: the state must not only consider the other policies but empirically *demonstrate* their inefficacy as to the particular practitioner.

Arkansas demonstrated no such thing. In the absence of such a showing, there is nothing to which the Court *can* defer—except the very sort of arbitrary and conclusory justification that RLUIPA was intended to eradicate. Joint Statement, *supra*, at 16,699 ("inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations" are not to receive the same deference as actual exercises of "experience and expertise" under RLUIPA); *Warsoldier*, 418 F.3d at 1000 (holding that the government failed to meet strict scrutiny where other jurisdictions were able to accommodate the same religious practice via less restrictive means). Respondents have failed to carry their burden under RLUIPA, and their speculative and unsupported conclusions are not entitled to deference.

II. REASONABLE RELIGIOUS ACCOMMODATIONS MAY ENHANCE PRISON SECURITY.

The requested exemption in this case is, in fact, far more likely to enhance prison security than diminish it. Consistent with *amici*'s own experience, an established body of academic literature supports the proposition that the free exercise of religion among prisoners contributes to prisoner adjustment to harsh prison life, and prisoner rehabilitation from prior criminal activity. Both of these effects, in turn, have a positive impact on prison security and public safety. Accordingly, Respondents' denials are not only arbitrary and unsupported; they are fundamentally short-sighted in light of their purported security objectives.

A. The Empirical Literature Demonstrates That Accommodating Prisoner Religious Practice May Promote Prison Security.

Abundant social science literature shows that respecting the right of prisoners to practice their religion promotes prisoner adjustment to prison life, promotes rehabilitation, and reduces recidivism. *Amici*'s collective experience administering prisons in Colorado, New Hampshire, Oklahoma, Washington and the Federal Bureau of Prisons confirms this research. "Broad[ly]" accommodating religious practices under RLUIPA puts prisons in the best possible position to take advantage of these very real benefits. 42 U.S.C. § 2000cc-3(g).

1. Allowing Prisoners to Practice Their Religion Can Promote Adjustment.

Allowing prisoners to practice their religion in accordance with their faiths can serve an important role in promoting prisoners' adjustment to the new environment in which they find themselves.

Studies show a robust relationship between prison policies that accommodate religious practices and a diminished deviance among prisoners. This relationship is observed across various measures of religious practice or participation, when tested against indicators of "deviance" as varied as instances of disciplinary confinement, Todd R. Clear & Melvina T. Sumter, *Prisoners, Prison, and Religion*, J. of Offender Rehab., Vol. 35(3-4), at 125, 152 (2002); the number of infractions, Thomas P. O'Connor & Michael Perryclear, *Prison Religion in Action and its Influence on Offender Rehabilitation*, J. of Offender Rehab., Vol. 35(3-4), at 11, 26, 28 (2002); and the propensity to engage in conflict with fellow prisoners, Kent R. Kerley *et al.*, *Religiosity, Religious Participation, and Negative Prison Behaviors*, 44 J. for the Sci. Study of Religion 443, 453 (2005). And the free exercise of religion retains its importance as a variable in these contexts "even after other variables [are] entered into the equation." Todd R. Clear *et al.*, *Does Involvement in Religion Help Prisoners Adjust to Prison?* NCCD Focus, Nov. 1992, at 1, 4; *see also* Byron R. Johnson, *Religious Participation and Criminal Behavior*, *in* Effective Interventions in the Lives of Criminal Offenders 3, 14-15 (J.A. Humphrey & P. Cordella eds., 2014).

Amici's experience confirms the conclusions in the literature: allowing prisoners to exercise their religious beliefs can help moderate the harsh impact of prison life. Incarceration introduces severe deprivations of freedoms, including significant impediments to the ability of religious prisoners to practice their religion at a time when those prisoners may need the solace and stability provided by their faith traditions more than ever. For some, faith and religious exercise can provide a new sense of purpose or meaning in the absence of these freedoms. SpearIt, *Religion as Rehabilitation? Reflections on Islam in the Correctional Setting*, 34 Whittier L. Rev. 29, 38-39 (2012); *see also* O'Connor & Perryclear, *supra*, at 28 (faith can contribute "hope and motivation to change" for some prisoners in the correctional setting). For others, the freedom to exercise religious beliefs can lead to engagement with religious communities within the prison, which can have its own intrinsic benefits as well as steering prisoners away from more harmful social groups like prison gangs. *See* Clear *et al.*, *supra*, at 6 (religious exercise "exposes a prisoner less to the problems of prison life"); SpearIt, *supra*, at 48. It is *amici*'s experience that allowing prisoners latitude to exercise their religious beliefs as they see fit enables prison administrators to harness the positive influence of religion in the prison setting.

2. Accommodating Religious Exercise Can Promote Prisoner Rehabilitation and Reduced Recidivism.

Permitting prisoners to practice their faiths in accordance with their beliefs also promotes

rehabilitation and moderates the likelihood of recidivism. Again, the research is abundant.

In 2012, Byron R. Johnson and Sung Joon Jang conducted "the most comprehensive assessment of the religion-crime literature to date by reviewing 270 studies published between 1944 and 2010." Byron R. Johnson & Sung Joon Jang, *Crime and Religion: Assessing the Role of the Faith Factor, in* Contemporary Issues in Criminological Theory and Research The Role of Social Institutions: Papers from the American Society of Criminology 2010 Conference 117, 120 (Richard Rosenfeld *et al.* eds., 2012). The results of this meta-analysis "confirm[ed] that the vast majority of the studies"—approximately 90 percent (244 out of 270)—"report pro-social effects of religion and religious involvement on various measures of crime and delinquency." *Id.* The studies that were part of this systematic review "utilize[ed] vastly different methods, samples, and research designs," and yet nearly all pointed to the same conclusion: "increasing religiosity is consistently linked with decreases in various measures of crime or delinquency," a link that was "particularly pronounced among the more methodologically and statistically sophisticated studies that rely upon nationally representative samples." *Id.*; *accord* Byron R. Johnson *et al.*, *A Systematic Review of the Religiosity and Delinquency Literature: A Research Note*, 16 J. of Contemp. Crim. Jus., 32, 46 (2000); Christopher P. Salas-Wright *et al.*, *Buffering Effects of Religiosity on Crime: Testing the Invariance Hypothesis Across Gender and Developmental Period*, 41 Crim. Jus. & Behavior 673, 688 (2014).

B. Congress Was Well Aware Of This Dynamic In Promulgating RLUIPA.

Congress enacted RLUIPA against this academic backdrop—well-developed even by 2000, when RLUIPA was passed. The statute's text confirms Congress's determination that prison officials must accommodate religious freedom when possible, and the legislative history is replete with references to the important role played by allowing prisoners the right to exercise their faiths as they see fit. This legislative history again is consonant with *amici*'s experience.

For example, Senator Strom Thurmond observed that for some prisoners, allowing religious practice "helps rehabilitate them and makes them less likely to commit crime after they are released." *Religious Liberty: Hearing On Issues Relating to Religious Liberty Protection Before the S. Comm. on the Judiciary*, 106th Congress 20 (1999) (statement of Sen. Strom Thurmond) (the "*Religious Liberty* Hearing"). And even while testifying against the bill, New York's Department of Correctional Services Commissioner acknowledged that "every correction administrator in the country recognizes the vital role played by most religious practices and beliefs * * * in maintaining a sense of hope and purpose among individual inmates *and in enhancing overall institutional safety* and well-being." *Id.* at 175 (prepared statement of Glenn Goord, Commissioner, New York State Department of Correctional Services) (emphasis added). As Mr. Goord stated: most prisoners who sincerely practice their religious beliefs "do not pose institutional problems," but rather "promote institutional stability." *Id.* Indeed,

witnesses emphasized the "societal interest" in protecting prisoner religious liberty, given that "[r]eligious observance by prisoners is strongly correlated with successful rehabilitation." *Protecting Religious Freedom After Boerne* v. *Flores: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 7 (1997) (testimony and prepared statement of Charles Colson, President, Prison Fellowship Ministries) (the "*Protecting Religious Freedom* Hearing"); *see also id.* at 76, 79 (peaceful practice of prisoners' religious beliefs has been shown empirically "to have powerful rehabilitative effects" (testimony and prepared statement of Prof. Thomas C. Berg, Cumberland Law School, Samford University)).[7]

This abundant testimony was not lost on Congress. In a floor statement urging passage of RLUIPA, Senator Hatch explained that "[s]incere faith and worship can be an indispensable part of rehabilitation, and these protections [provided by the bill] should be an important part of that process." 146 Cong. Rec. 14,283, 14,285 (2000) (statement of Sen. Hatch on behalf of himself and Sens. Kennedy, Hutchison, Daschle, Bennett, Lieberman and

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[7] *See also Protecting Religious Freedom* Hearing 59, 60, 86 (testimony and prepared statement of Sixth Circuit Judge Jeffrey Sutton, then Solicitor of the State of Ohio) (discussing positive role of religion in rehabilitation); *Protecting Religious Freedom After Boerne* v. *Flores (Part III): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 40, 43 (1998) (testimony and prepared statement of Isaac M. Jaroslawicz, Director of Legal Affairs, Aleph Institute) (same).

Schumer). In sum, the rehabilitative impact of freedom of religious practice was squarely before Congress when it considered and passed RLUIPA in 2000, and constituted a motivating factor in the passage of the bill.

C. Courts And Experts Recognize The Impact That Accommodating Religious Exercise Can Have On Prisoner Adjustment and Rehabilitation.

Courts, too, have recognized the salutary relationship between accommodating religious practices inside prison and a prisoner's adjustment and rehabilitation. In *Brown* v. *Livingston*, a Texas prisoner challenged prison policies that prevented unsupervised gatherings of more than four persons for religious services and limited the supervision of prisoners for the purpose of holding religious services to no more than one hour per week. --- F. Supp. 2d --, Civil Action No. 4:69-cv-00074, 2014 WL 1761288, at *1 (S.D. Tex. Apr. 30, 2014). The court held evidentiary hearings and heard "undisputed testimony" that "overall, the regular practice of religion improves prison safety." *Id.* at *7. The court acknowledged the body of social science research supporting this point, and found that allowing religious prisoners to practice their faith makes for a safer prison unit and a safer community. *Id.* at *8. Even the *state's* witnesses supported these points. *Id.*; *see also Grayson* v. *Schuler*, 666 F.3d 450, 453 (7th Cir. 2012) ("accommodating a genuine religious observance might reduce rather than increase the risk of prisoner misconduct").

Similarly, in the lower court proceedings in *Knight*, the court heard testimony on behalf of the petitioners from George Earl Sullivan—a former Oregon, New Mexico, and Colorado prison official—that providing prisoners the freedom to exercise their religious beliefs promoted prisoners' "support and acceptance of [the] prison environment." *Knight*, Jan. 22, 2009 Hr'g Tr. 149:9-24. By contrast, "prison systems that deny important religious practices such as wearing long hair create resentment and breed anger, hostility and animosity," that can pose "a serious threat of conflict with officers and is a threat to the safety, security, and good order of the prisons." *Knight* Trial Ex. 5, at 11 (Expert Report of G. Sullivan). Thus, Mr. Sullivan stated,

> permitting long hair serve[s] the important purpose of enhancing the safety, security, and good order of the prison, as well as protecting the public safety by reducing resentment and anger among inmates, reducing dissatisfaction and perhaps the desire to escape, and providing optimal rehabilitation opportunities to maximize the changes of integrating into society upon release.

Id. at 8.

Also in *Knight*, Dr. Deward Walker, a Professor of Anthropology at the University of Colorado, testified that the grooming exemptions sought by the Native American plaintiffs in that case enabled a "return to traditionalism" that allowed prisoners to draw on resources needed to overcome the difficulties associated with the transition to prison life. Jan. 21, 2009 Hr'g Tr. 111:19-112:3. Conversely, the denial of

these exemptions could cause "depression, anxiety, resentment, anger, hostility, and antagonism in those whose hair is cut," due to the spiritual significance of the practice of wearing long hair for Native Americans. *Knight* Trial Ex. 2, at ¶ 7 (Expert Report of D. Walker).

* * *

The fact that the accommodation of religion can have a positive impact on prisoner adjustment and rehabilitation—and, as a result, on prison security—is well established, was a motivating factor underlying RLUIPA's passage, and has been recognized by the courts. Because religious accommodation generally promotes, rather than detracts from, prison security, religious exemptions should be provided to the "maximum extent" available under the law.

III. PRISON SECURITY IS FURTHER ENHANCED WHEN RELIGIOUS EXEMPTIONS ARE EVALUATED IN WAYS THAT ARE PERCEIVED TO BE NON-ARBITRARY AND FAIR.

RLUIPA imposes a duty on prison officials to demonstrate that any substantial burden imposed on the free exercise rights of prisoners represents the least restrictive means of achieving a compelling state interest. It is not enough, therefore, for prison officials simply to recite that they have considered less restrictive policies adopted by other prison systems and have chosen to reject them. But when prison officials fail even to consider less restrictive means that have proven successful elsewhere – indeed, in a large majority of jurisdictions across the

country – prison security is further undermined by a rulemaking process that prisoners reasonably understand to be arbitrary and unfair.

Numerous studies have shown that prisoner perceptions of fairness in both approach and outcome have a profound impact on overall social order within prisons. In *amici*'s experience, where prisoners see institutional policies as fair, they are far more likely to obey them and view their issuers as legitimate sources of authority.

Indeed, this notion of fairness was central to RLUIPA, which was designed to alleviate "egregious and unnecessary" prison restrictions on religious liberty, *Cutter*, 544 U.S. at 716 (quoting Joint Statement, *supra*, at 16,699), by requiring prison administrators to "*demonstrate*" that any policies that burden religious practice further compelling government interests via the least restrictive means. 42 U.S.C. § 2000cc-1(a) (emphasis added). Here, Respondents' no-beard policy is at odds with the rules in most other U.S. prison jurisdictions, and Respondents have failed to demonstrate the need for this different treatment with case-specific evidence. *See Gonzales* v. *O Centro Espirita Beneficiente Uniao Do Vegetal*, 546 U.S. 418, 436 (2006) (RLUIPA and RFRA require "case-by-case consideration of religious exemptions to generally applicable rules"). Instead of promoting security, Respondents' arbitrary policy is likely to exacerbate prisoner perceptions of arbitrary rulemaking and compromise institutional order. RLUIPA demands more, and so do the very security interests Respondents purport to invoke.

A. Prisoners Are More Likely To Obey Rules They Perceive To Be Fair And Legitimate.

A substantial body of research supports the experience of *amici* that prisoners will tend to view as legitimate those rules that they perceive were created fairly, and that result in a fair outcome under the circumstances. Indeed, perceptions of legitimacy are increasingly seen as a *tool* for increasing voluntary rule compliance: positive prisoner views of the institutional process afforded to them directly correlate with reduced instances of misconduct. Scholars have described these perceptions of fairness as the single "strongest and most consistent predictor" of decisional acceptance, rule compliance, and grievances across organizational settings. Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, 25 Advances in Experimental Social Psychology 115, 131-32 (1992).

When institutional decisions are seen as fair, regulated parties are more likely to see the issuing institution as "legitimate," such that "although at times specific policies can be disagreeable, the institution itself ought to be maintained—it ought to be trusted and granted its full set of powers." Vanessa A. Baird, *Building Institutional Legitimacy: The Role of Procedural Justice*, 54 Pol. Research Q. 333, 334 (2001). Fairness depends in part on the perception that decision-makers have acted with "neutrality," using "assessments of honesty, impartiality, and the use of fact, not personal opinions" in considering one's case. Tom R. Tyler, *Procedural Fairness & Compliance with the Law*, 133 Swiss. J. Econ. & Statistics 219, 228 (1997). In

turn, regulated parties are more likely to internalize these institutional rules and norms as a basis for self-regulation. *See* David .J. Smith, *The Foundations of Legitimacy*, *in* Legitimacy & Criminal Justice: An International Perspective 30 (Tom R. Tyler ed., 2007); Tom R. Tyler, *Why People Obey the Law* 25 (1990) (when people believe that they are being treated fairly, they are more likely to accept the "need to bring their behavior into line with the dictates of an external authority"). This is so even when cooperation may not be in an individual's immediate self-interest but is seen as the "appropriate and proper" course supporting the authorities' objectives. *See* Tom R. Tyler & Jeffrey Fagan, *Symposium: Legitimacy and Criminal Justice, Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 Ohio St. J. Crim. L. 231, 263 (2008).

Amici's experience and targeted studies confirm that these principles hold particularly true in prison environments. The research reveals that fairness-based "justice judgments were directly associated with prisoner misconduct," because prisoners who evaluated prison officials' use of authority as just were significantly less likely to engage in misconduct or be charged with violating prison rules. Michael D. Reisig & Gorazd Mesko, *Procedural Justice, Legitimacy, & Prisoner Misconduct*, 15 Psychology, Crime & Law 41, 54-56 (2009); Anthony E. Bottoms, *Interpersonal Violence & Social Order in Prisons*, *in* Prisons: Crime & Justice: A Review of Research 261 (Michael Tonry & Joan Petersilia eds., 1999) ("staff approaches and skills can in a real sense act as a mediating force" and affect the "eventual outcome of good and bad behaviour" among prisoners). One

study found that a key context for prisoner assaults on staff is "protest," where a prisoner "considers himself to be the victim of unjust or inconsistent treatment by a staff member." *Id.* at 260-61.

This type of prisoner buy-in is important to prison safety; "it remains the case that order * * * depends on the acquiescence and cooperation of prisoners themselves. Without the active cooperation of most prisoners, most of the time, prisons could not function effectively." Jonathan Jackson *et al.*, *Legitimacy and Procedural Justice in Prisons*, Prison Service J., Sept. 2010, at 4, 4. In contrast, feeling "pushed around" tends to motivate prisoner justifications for engaging in violence while incarcerated. Michelle Butler & Shadd Maruna, *The Impact of Disrespect on Prisoners' Aggression: Outcomes of Experimentally Inducing Violence-Supporting Cognitions*, 15 Psychology, Crime & Law 235, 242, 246 (2009) (finding that male prisoners' perceptions of disrespectful treatment affirmatively increased their denial of responsibility for misconduct). Cooperation is also compromised when authorities are viewed as excluding some persons or views from consideration. Jan-Willem van Prooijen *et al.*, *Procedural Justice in Punishment Systems: Inconsistent Punishment Procedures Have Detrimental Effects on Cooperation*, 47 Brit. J. of Soc. Psychology 311, 312-13 (2008) (observation of inconsistent treatment leads individuals to feel marginalized and cooperate less often).

Prisoner cooperation rooted in perceptions of institutional legitimacy and fairness also reduces the need to resort to punishment-based techniques that are less cost-effective and of less enduring impact

than voluntary compliance. *See, e.g.*, Tom R. Tyler, *Psychology and Institutional Design*, 4 Rev. of Law & Econ. 801, 805-09 (2008); *see also* Richard Sparks *et al.*, *Prisons and the Problem of Order* 151 (1996) (maximizing disciplinary control may not be "worth the candle," insofar as it jeopardizes relationships between prisoners and prison staff, sacrifices cooperation, and detrimentally disrupts normal routines). Maintaining prisoner-staff cooperation is central not only to maintaining security but to responding when it is breached. Multiple studies have shown that widespread lack of trust in prison staff is a primary driver of reluctance to report victimization, and that prisoners report only about 9-10% of incidents. Kimmett Edgar et al., *Prison Violence: The Dynamics of Conflict, Fear, and Power* 196 (2003). Primary reasons given by adult prisoners included perceptions that "staff would not do anything" (29%) and "staff do not care" (33%). *Id.*

The experiences of *amici* and extensive scholarship indicate that the interest of prison officials in maintaining secure prisons should be seen as coextensive with supporting prisoner perceptions of fair administration.

B. Reasonable Religious Accommodations Contribute To Perceptions of Fairness, And Thus To Prison Security.

Amici's experience, again supported by the literature, is that granting religious accommodations affirmatively supports perceptions of fairness among

prisoners. As *amici* have observed across prison populations, prisoner perceptions of fairness improve when their religious practices are accommodated through even-handed exemption procedures. Indeed, these principles of fairness were central to the goals of RLUIPA.

As noted above, RLUIPA's legislative history shows that religious exercise has often been burdened in the prison setting in arbitrary, excessive and sometimes discriminatory ways. In fact, one of the elements of unfairness identified in RLUIPA's legislative history was the fundamental inequity manifest in the exact situation presented here, where "what prison officials insist in one facility would bring chaos and a total breakdown of security, works perfectly well in apparently comparable facilities." *Protecting Religious Freedom After Boerne v. Flores (Part III): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 3, 11 (statement of Marc D. Stern, Legal Dir., American Jewish Cong.). As the Joint Statement explained, "[f]ar more than any other Americans, persons residing in institutions are subject to the authority of one or a few local officials," such that "[their] right to practice their faith is at the mercy of those running the institution, and their experience is very mixed." Joint Statement, *supra*, at 16,699. Prison experience showed that "whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways." *Id.*[8]

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[8] This Court set out some of the specific arbitrary practices RLUIPA was intended to remedy in *Cutter*, 544 U.S. at 716 n.5. As several of those examples indicate,

RLUIPA was expressly intended to rein these excesses in to the extent they arise in the religious exemption context, by subjecting determinations on requests for religious exemptions to strict scrutiny—thereby requiring that such requests be handled in a non-arbitrary manner. Denials imposing "substantial burdens" on religious practices must further a compelling government interest—one "demonstrate[d]" by the government—for which no less restrictive means of achieving that interest are available. 42 U.S.C. §§ 2000cc-1(a)(1), (2). Thus, any less restrictive means actually adopted by other jurisdictions must not only be "considered" by the state, but "demonstrated" empirically to be unworkable.

RLUIPA's requirement of strict scrutiny, which Respondents have failed to meet in this case, thereby protects religious freedom, promotes fairness, and enhances prison security. As the experience of *amici*

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the potential for uneven administration was of particular consequence to minority religious groups such as Muslims and Native Americans. For example, Muslims constitute 9.3% of federal prisoners and often smaller percentages of state prisoners. U.S. Commission on Civil Rights, *Enforcing Religious Freedom in Prison* 13-15 & Tbls. 2.1, 2.2 (2008) (citing modified data from The Pew Forum on Religion & Public Life, *U.S. Religious Landscape Survey—Religious Affiliation: Diverse & Dynamic*, 10, 12 (Feb. 2008)) (hereinafter "USCCR Report"). And yet Muslim prisoners filed the highest percentage of religious discrimination grievances, accounting for 26.3% of the complaints reaching the Commission from 2005-2007. USCCR Report at 26 (citation omitted). One of the primary violations alleged was "religious grooming and dietary standards." *Id.*

and the social science literature confirm, Religious accommodations in most instances can and should be granted to *further* prison security. Arkansas's conclusion to the contrary is both unsupported and ill-advised, and cannot withstand strict scrutiny.

* * *

CONCLUSION

For the foregoing reasons, and those in Petitioner's brief, the decision below should be reversed.

Respectfully submitted,

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May 29, 2014

AMICUS CURIAE BRIEF

No. 13-6827

IN THE
Supreme Court of the United States

GREGORY HOUSTON HOLT,
A/K/A ABDUL MAALIK MUHAMMAD,
Petitioner,

v.

RAY HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF FORMER PRISON WARDENS AMICI CURIAE IN SUPPORT OF PETITIONER

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May 2014

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are former prison wardens who are sensitive to the pressing needs and distinct challenges of the penal setting. As individuals who have worked on the front lines of prison administration, *amici* recognize that there are cases where the important religious rights of inmates must give way to the security concerns of the prison system. But this not such a case. Rather, in the view of *amici*, this is a case where the attenuated security concerns articulated by Respondents reflect post-hoc rationalizations, outdated philosophies, and policies that fall short of industry standards.

Amici believe that the goals of prison administration are best served when prison officials are motivated to engage in meaningful analysis of requests for religious accommodations. Requiring officials to demonstrate thoughtful consideration of their practices and to make accommodations where possible not only weeds out practices that unnecessarily burden religious freedom, it leads to better public policy and more effective security safeguards for prisons.

Amicus Jeanne Woodford is currently a Senior Distinguished Fellow at the Chief Justice Earl War-

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[1] Pursuant to Rule 37, blanket letters of consent from the parties have been filed with the Clerk of the Court. In accordance with Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici curiae* or their counsel made a monetary contribution intended to fund the preparation of this brief.

ren Institute on Law and Social Policy at University of California, Berkeley School of Law. From 1999 to 2004, she served as warden of California's San Quentin State Prison. Ms. Woodford was the Defendant in *Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005), in which the Ninth Circuit ruled in favor of a prison inmate requesting a religious accommodation in connection with California's previous grooming policy. In 2004, Ms. Woodford was appointed Director of the California Department of Corrections and Rehabilitation (CDCR), the largest correctional system in the United States, and in July 2005, she was appointed Undersecretary of CDCR. Ms. Woodford then became the Chief of the San Francisco Adult Probation Department. She retired in 2008 after 30 years of work at the state and county level of government in the field of criminal justice.

Amicus Dr. Reginald A. Wilkinson is currently the President and CEO of the Ohio College Access Network. From 1986 to 1988, he served as warden of Ohio's Dayton Correctional Institution. In 1991, Dr. Wilkinson was appointed Director of Ohio's Department of Rehabilitation and Correction (ODRC). In this position, Dr. Wilkinson was the Defendant in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), in which this Court upheld the constitutionality of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc. He retired in April 2006 after 33 years of experience with the ODRC. Dr. Wilkinson is also the former Chairperson and current member of the National Institute of Corrections Advisory Board as well as Chair of the national Prison Rape Review Panel. He is a past president of the American Correctional Association, the Associa-

tion of State Correctional Administrators, and the International Association of Reentry. He is also the former Vice Chair of the International Corrections and Prison Association, North America.

Amicus Richard Subia is currently a Public Safety Consultant and sits on the Heald College Criminal Justice Advisory Board. From 2006 to 2007, he served as warden for California's Mule Creek State Prison. Mr. Subia has over 26 years of experience with CDCR, during which time he also held the positions of Correctional Officer, Correctional Sergeant, Correctional Lieutenant, Correctional Administrator, and statewide Director of the Division of Adult Institutions.

Amicus Dr. Allen Ault is currently the Dean of the College of Justice & Safety at Eastern Kentucky University. From 1971 to 1973, Dr. Ault served as warden for Georgia's Diagnostic and Classifications Prison, a maximum security prison. He also served as Chief for the National Institute of Corrections, as the Commissioner of state departments of corrections for five governors in three states (Colorado, Georgia, and Mississippi), and as Chairman of the Florida Board of Corrections for eight years. During his career, he has been Chairman and Full Professor in the Criminal Justice Department at Georgia State University, a Rehabilitation Counselor, Director of State Programs for the Mentally Retarded, and President of a national criminal justice consulting firm.

INTRODUCTION AND SUMMARY OF ARGUMENT

There is no question that correctional facilities are a unique setting fraught with significant security concerns. But prison officials must address these concerns while taking into account other important interests, including the religious rights of inmates. When drafting the Religious Land Use and Institutionalized Persons Act (RLUIPA), Congress was well aware of the pressing security issues in the penal context. Yet Congress also recognized that prison officials sometimes impose arbitrary rules that unnecessarily restrict religious liberty. In the view of *amici*, this case is precisely the type Congress was concerned about—where vaguely articulated security concerns are being used to justify an outdated and unwarranted policy depriving an inmate of his religious rights.

This brief seeks to bring the expertise of former prison wardens to bear on four important points.

I. First, careful consideration of an inmate's request for religious accommodation, taking account of any unique security threats and characteristics of the inmate, is consistent with good prison administration practice. Experts in prison administration advocate use of objective criteria to evaluate the risks and needs of a specific inmate, in contrast to broad policies based on a one-size-fits-all approach. Requiring prisons periodically to engage in this type of thoughtful consideration not only gives meaning to RLUIPA's strict scrutiny review, it leads to sound policy that promotes more effective security while

simultaneously better meeting inmates' needs. Courts should require prison officials to present evidence showing that they carefully analyzed an inmate's accommodation request in light of the specific circumstances of that inmate and that prison before denying the request.

II. Second, in addition to their legal significance, comparisons to policies of other prisons serve the interests of effective prison administration. National prison administration bodies encourage prison officials, as a matter of best practice, to contact other jurisdictions with comparable facilities and thoroughly review relevant literature to avoid reinventing systems that have been successfully implemented or refined by other jurisdictions. A range of resources exists to facilitate this type of helpful comparison of policies, from formal guidance provided by national bodies, to the common practice of picking up the phone to call other prisons.

The successful implementation of less restrictive approaches in comparable jurisdictions is legally significant because it provides strong evidence that the policy at issue is not the least restrictive alternative. Arguably such evidence should create a presumption that less restrictive alternatives exist, particularly when the vast majority of jurisdictions successfully implement such approaches. If prison officials do not rebut this evidence by demonstrating why the policies of other jurisdictions are unworkable in their facility, then wide-spread use of less restrictive approaches may be determinative under RLUIPA's searching review. Further, courts should require prison officials to provide evidence demonstrating

their expertise in industry standards and practices so that courts can determine whether the officials' judgments are worthy of deference.

III. Third, the security concerns articulated by the prison officials here lack credibility and appear to rest on post-hoc rationalizations as well as outdated or legally invalid justifications. Prohibiting a half-inch beard maintained for religious purposes is far from the least restrictive method of preventing contraband secretion; in fact, it is probably one of the least effective solutions to that problem. Similarly, prohibiting such beards is a much less effective answer to negligible escape identification concerns than the very manageable—and widely employed—solution of keeping multiple digital photographs in an inmate's file. In any event, Respondents here have not even attempted to explain why any of their concerns apply only to beards grown for religious but not medical reasons.

Respondents' have also explained that their denial of accommodation here stems in part from the desire to avoid having to make exceptions to prison rules. But by its very terms, RLUIPA requires that exceptions be made in some cases. Respondents may also be influenced by political considerations, which can lead prison administrators to establish policies that restrict the provision of any additional benefits to inmates, even when the requested accommodations are meritorious.

IV. Fourth, a body of evidence demonstrates that allowing inmates to practice their religion may lead

to security benefits for prisons, as well as broader rehabilitative benefits for inmates and society.

ARGUMENT

I. Careful Consideration of An Inmate's Request for Religious Accommodation Is Consistent with Good Prison Administration Practices.

RLUIPA requires prison officials to "demonstrate[]" that a restriction on religious freedom is "in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling government interest." 42 U.S.C. § 2000cc-1(a). The statute also requires officials to "meet[] the burdens of going forward with the evidence and of persuasion" on these issues. 42 U.S.C. §§ 2000cc-1, 2000cc-5(2).

When Congress drafted this statute, two of RLUIPA's Senate sponsors expressed concern that "prison officials sometimes impose frivolous or arbitrary rules. Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways." 146 Cong. Rec. 16698, 16699 (2000) (joint statement of Senators Hatch and Kennedy). Thus, at a minimum RLUIPA was intended to weed out arbitrary and frivolous policies that burden religious freedoms while rendering negligible benefits to prison systems.

Here, the Eighth Circuit upheld just such an arbitrary rule, without requiring any "demonstrat[ion]" that the prison officials considered the rule's necessi-

ty, or any other alternatives, before denying the requested accommodation. *See* J.A. 184-87. To the contrary, the court appears to have applied a presumption that RLUIPA's burden has been met, "absent substantial evidence in record indicating that response of prison officials to security concerns is exaggerated." J.A. 186 (characterizing an earlier Eighth Circuit decision). Under this rule, which inappropriately shifts the burden to inmates, so long as prison officials make a talismanic reference to "security concerns," the court presumes that any prison practice survives strict scrutiny. This holds true even if prison officials merely proffer conclusory justifications, nonresponsive rejections of an inmate's proposed alternatives, and obsolete policies out of line with industry standards. Transforming RLUIPA into a mere rubber stamp of prison action will allow officials to reflexively reject any religious accommodation request without actual consideration of whether the prison's rules remain necessary, or even beneficial, for the prison.

This Court should reject that approach and instead prescribe a rule requiring prison officials to provide specific, credible evidence demonstrating they "actually considered"—rather than automatically denied—an inmate's request for religious accommodation. *Greene v. Solano Cnty Jail*, 513 F.3d 982, 989-90 (9th Cir. 2008); *see also* S. Rep. No. 103–111, at 10 (1993) ("[I]nadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements."). This consideration should focus on specific circumstances of the particular inmate and prison setting.

Such inmate-specific consideration is consistent with the type of analysis at the forefront of best practices for prison management. Specifically, the National Institute of Corrections (NIC) has observed that prisons and jails ought to implement objective classification systems that evaluate risks and needs based on criteria unique to each inmate. "[O]bjective systems depend on a narrow set of well-defined legal factors (e.g., severity of current offense, prior convictions, etc.) and personal characteristics (e.g., age, marital status, etc.)." These items are then "used to assess an inmate's level of risk or program needs." James Austin, *Objective Jail Classification Systems: A Guide for Jail Administrators* 3, U.S. Dep't of Justice, Nat'l Inst. of Corr. (Feb. 1998), *available at* http://nicic.gov/library/014373.

Classification systems "fulfill a wide range of correctional purposes, including preserving order in an institution; sustaining prisoner discipline; assessing prisoners' needs; assigning prisoners to appropriate programs; providing equitable treatment; protecting staff, prisoners, and the public; allocating prison resources; and planning for prison management." James Austin & Patricia Hardyman, *Objective Prison Classification: A Guide for Correctional Agencies* 6, U.S. Dep't of Justice, Nat'l Inst. of Corr. (July 2004), *available at* http://nicic.gov/library/019319. Classification systems are also "the principal management tool for allocating scarce prison resources efficiently," and they "help to minimize the potential for prison violence, escape, and institutional misconduct." *Id.* at 1.

In the experience of *amici*, an effective classification system would allow prison officials to evaluate a religious accommodation request based on the particular security concerns (or lack thereof) posed in a specific context.[2] For inmates who receive accommodations, additional security measures can be implemented to address specific concerns that may arise. Engaging in this type of thoughtful consideration is not only necessary to give meaning to RLUIPA's protections, it leads to sound policy that promotes more effective security while simultaneously better meeting inmates' needs.

II. Comparisons to Other Prison Policies Are Not Only Legally Significant, They Help to Identify Best Practices of Prison Administration.

The Eighth Circuit gave little or no weight to the fact that many other jurisdictions do not restrict beards maintained for religious reasons. J.A. 186-87. However, in addition to their relevance to the RLUIPA analysis, *amici* believe comparisons with policies

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[2] This particularized analysis focused on application of objective criteria to the specific circumstances of individual inmates stands in contrast to subjective classification models (now largely defunct). Under these older models, prison officials reached decisions "based on the agency's correctional philosophy," or other subjective criteria. James Austin, *Objective Jail Classification Systems: A Guide for Jail Administrators* 17, U.S. Dep't of Justice, Nat'l Inst. of Corr. (Feb. 1998), *available at* http://nicic.gov/library/014373. Painting in broad and arbitrary brushstrokes led to problematic classifications that were inconsistent or inaccurate, outcomes that undermined penological interests.

of other prisons are valuable aids to good prison administration.

A. Prison Officials Should Periodically Review Policies and Practices of Other Institutions to Keep Current and Avoid Re-inventing the Wheel.

To identify best practices in prison administration, prison officials can and should regularly compare their own policies to those of other institutions on related issues. Doing so helps prison officials 1) keep up with swiftly changing technology in the prison management industry, and 2) avoid re-inventing the wheel when other prisons have found workable solutions or refined practices for prison administration. A rule that incentivizes prison officials to review the practices of other jurisdictions where relevant would encourage sound policy and better use of limited prison resources.

Indeed, in a speech before the International Corrections and Prisons Association, *amicus* Dr. Wilkinson explained that building and sustaining best practices depend on the willingness of prison officials to "benchmark outside the organization for correctional best practices" and "avoid reinventing the wheel" by working "hard and with creativity in an effort to identify where there are established programs whose effectiveness has been documented and may be used to guide the creation of a best practice." Dr. Reginald A. Wilkinson, *Correctional Best Practices: What Does It Mean In Times of Perpetual Transition?* 4, Keynote Speech Before the Fifth Annual Conference, International Corrections and Prisons

Association, Miami, Florida (Oct. 27, 2003). Dr. Wilkinson also noted that "it is only prudent to build correctional best practices that may be replicated by others." *Id.*; *see also* Lonnie Lemons, *Developing Effective Policies and Procedures* 10, The Criterion (2010), *available at* http://www.mycama.org/uploads/7/7/6/3/7763402/the_criterion__-__august_20101.pdf.

Similarly, the NIC recommends that prison officials considering new classification criteria should engage in a "thorough review of the literature" and "avoid reinvent[ing] a system that already has been developed or refined by another jurisdiction." *See* James Austin & Patricia Hardyman, *Objective Prison Classification: A Guide for Correctional Agencies* 32, U.S. Dep't of Justice, Nat'l Inst. of Corr. (July 2004), *available at* http://nicic.gov/library/019319. The NIC further noted that "[a]n important strategy for learning about models and promising approaches is to contact comparable state agencies that have implemented the model." *Id.*

Officials who wish to identify and compare the policies of other prisons have access to a wide array of resources. In the experience of *amici*, prison officials frequently pick up the phone and call officials in other jurisdictions to learn more about their policies, and many prison policies are a matter of public record. Prison officials attend workshops and conferences, and they also employ consultants who have visibility into policies of other prisons. Finally, a number of professional associations and agencies focus on the development of best practices and/or the dissemination of such practices to prison officials, including the American Correctional Association

(which publishes standards), the Criminal Justice Institute, the American Bar Association, the International Community Corrections Association, and the NIC.

Had Respondents explored available resources, presumably they would have recognized that their policy stands as an aberration when viewed against wide-spread industry practices based on less restrictive grooming policies. Thirty-nine states, the United States, and the District of Columbia permit beards either for all prisoners or for prisoners with religious motivation. *See* Dawinder S. Sidhu, *Religious Freedom and Inmate Grooming Standards*, 66 U. Miami L. Rev. 923, 964-72 (2012). Similarly, the ABA recommends allowing prisoners "a reasonable choice in the selection of their own hair styles and personal grooming, subject to the need to identify prisoners and to maintain security." The ABA went on to note that "experience with religiously motivated grooming choices demonstrates the *low level of security risk* such choices entail, when reasonably regulated." American Bar Association, *Standards for Criminal Justice: Treatment of Prisoners* 216 (3d ed. 2011) (emphasis added); *see also id.* at 209; American Correctional Association, *Standards for Adult Correctional Institutions* 77 (4th ed. 2003).

But when asked below about the experience of other states, Respondents' witnesses testified that they were not "aware" of experiences elsewhere. *See* J.A. 101-02, 105-06, 110-11, 119, 127. Respondents' failure to educate themselves about other less restrictive alternatives should not shield their decision from RLUIPA's searching review.

B. The Ability of Other Prisons To Implement Less Restrictive Solutions Strongly Suggests that the Policy At Issue is Not the Least Restrictive Alternative.

There is little doubt that comparisons to policies of other prisons are relevant under RLUIPA's legal analysis. Many courts have found it legally significant that another prison, with similar compelling government interests, is able to accommodate the same activity that is being denied by defendant prison officials. Essentially, successful accommodations by other prisons create a strong suggestion—arguably even a presumption—that other workable, less restrictive alternatives are available; prison officials before the court must rebut that presumption by explaining how their prison is differently situated from other institutions. *See Warsoldier v. Woodford*, 418 F.3d 989, 1000 (9th Cir. 2005) ("Nevertheless, CDC offers no explanation why these prison systems are able to meet their indistinguishable interests without infringing on their inmates' right to freely exercise their religious beliefs."); *Spratt v. Rhode Island Dep't of Corr.*, 482 F.3d 33, 42 (2007) (government failed strict scrutiny "in the absence of any explanation of significant differences" between defendant's prison and federal prisons with less restrictive policies); *Washington v. Klem*, 497 F.3d 272, 285 (3d Cir. 2007) (government failed strict scrutiny where its "other institutions" made the requested accommodation); *Garner v. Kennedy*, 713 F.3d 237, 247 (5th Cir. 2013) (finding it "persuasive that prison systems that are comparable in size to Texas's—California and the Federal Bureau of Prisons—allow

their inmates to grow beards, and there is no evidence of any specific incidents affecting prison safety in those systems due to beards").

Even under the less searching review standard applied in the context of a First Amendment challenge to prison policies, this Court has found the activities of other prisons relevant to determining the propriety of the restriction at issue. *See Procunier v. Martinez*, 416 U.S. 396, 414 n.14 (1974) ("While not necessarily controlling, the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction."); *Turner v. Safley*, 482 U.S. 78, 97-98 (1987) (reasoning that the fact that Federal Bureau of Prisons generally allowed marriages suggested that there were alternatives to state prison's refusal to allow inmates to marry).

As discussed above, Respondents' policy denying accommodation for beards maintained for religious purposes is out of step with the less restrictive practices employed by the great majority of jurisdictions and recommended by national prison organizations. Yet Respondents have failed to provide any meaningful explanation—either below before the Magistrate or in their opposition to certiorari before this Court—why they are unable to allow an activity that so many other jurisdictions have been able to accommodate.

Certainly deference to the expertise of prison officials is warranted in many contexts. But no deference is appropriate where, as here, Respondents made no showing of any careful analysis or familiari-

ty with industry practices applicable to Petitioner's requested accommodation. *See Koger v. Bryan*, 523 F.3d 789, 800 (7th Cir. 2008) ("We can only give deference to the positions of prison officials as required by *Cutter* when the officials have set forth those positions and entered them into the record.").

III. The Security Concerns Respondents Articulated Lack Credibility And Appear to Rest on Outdated or Legally Invalid Justifications.

A. Prohibiting a Half-Inch Beard is One of the Least Effective Methods of Preventing Contraband Secretion.

The Eighth Circuit concluded that one security concern justifying Respondents' broad prohibition on inmate beards is the desire to prevent "concealing contraband." J.A. 186. In the experience of *amici*, however, the last place an inmate would choose to hide contraband is in a half-inch beard. If placed in a short beard, contraband could easily fall out or be seen by prison staff. Inmates are much more likely to hide forbidden objects in socks, shoes, boots, coats, other clothes, the hair on top of their heads, or other areas of the body not in plain view and more difficult to search. Thus, prohibitions on short beards do not provide any meaningful deterrent to the secretion of contraband.

If there is any doubt about whether items are stashed in an inmate's beard of half-an-inch (or more), prison staff can—and in fact often do—require inmates to vigorously run their fingers through their

beards. In the experience of *amici*, prisons frequently employ this policy, particularly prisons with very lenient grooming standards or no grooming restrictions at all. For example, in Missouri, where inmates "may have whatever hair and beard length they prefer," this privilege may be lost if the inmate refuses "to promptly follow staff directions with regard to a search of their hair or beard." Sidhu, 66 U. Miami L. Rev. at 950 n. 161 (citing *State Grooming Standards* 10 (Rev. Ulli Klemm, Adm'r, Religion & Volunteer Services, Bureau of Inmate Services, Pa. Dep't of Corr., ed.) (Dec. 17, 2009)). Similarly, Wyoming allows inmates to keep head and facial hair "at any natural length" provided that the hair "is able to be searched." *Id.* at 970 (citing Wyo. Dep't of Corr., Policy and Procedure: Inmate Grooming, Hygiene, and Sanitation, No. 4.201 § IV(D)(5) (2006), *available at* http:// corrections.wy.gov/Media.aspx?mediaId=37).

When an inmate runs his hands through his own hair, staff can avoid coming in contact with the inmate, which addresses both safety and sanitation concerns. It is doubtful whether this exercise would even be needed for a mere half-inch beard. But given that some prisons use this technique for inmates who have beards of unlimited lengths, certainly it would also be effective for a much shorter beard. It is unclear why this less restrictive alternative, which other prisons have employed successfully, would not be effective for Petitioner.

Moreover, the fact that Respondents allow inmates to have a quarter-inch beard for medical reasons severely undercuts their claim that an exception

cannot be made for religious reasons. J.A. 57. The security concerns should be no different based on the type of exception granted.[3]

As discussed in Part I, the most effective means of promoting security is through use of a modern objective inmate classification system, which assesses security risks based on the particular inmate at issue. Thus, if an inmate had previously tried to secrete contraband, heightened restrictions on that inmate might be warranted. For example, both Hawaii and Missouri have enhanced grooming restrictions for inmates who have been caught hiding contraband. *See* Sidhu, 66 U. Miami L. Rev. at 964.

Here, Respondents presented no evidence that Petitioner posed a unique contraband secretion risk. Had they presented such evidence, this would likely be a different case. But Respondents' broad assertion that beards present a contraband secretion risk is simply not credible nor deserving of any deference.

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[3] *See* Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA'S Prisoner Provisions*, 28 Harv. J.L. & Pub. Pol'y 501, 549 (2005) ("Allowing prisoners to grow beards for medical reasons, which also poses the potential of doing appreciable damage to the interest of preventing contraband from being hidden in facial hair, fatally undermines [the state's] assertion that denying [inmates] the ability to grow a [shorter] beard serves a compelling interest.").

B. Prohibiting a Half-Inch Beard is Not the Least Restrictive Method of Ensuring Inmate Identification or Preventing Prison Escape.

The Eighth Circuit also accepted Respondents' argument that their no-beard rule is justified on the ground that an inmate could change his appearance by shaving a beard upon escape from the prison. J.A. 186. This argument is problematic for at least three reasons.

First, in the experience of *amici*, it is a common practice for prisons to take a new picture of an inmate as the inmate's appearance changes. This would include maintaining before-and-after pictures of an inmate who grows a beard, as well as one who changes hair style or as the inmate ages. *See Garner*, 713 F.3d 237 (noting that prison officials could take a new photograph if an inmate changed his appearance); *Luckette v. Lewis*, 883 F. Supp. 471, 481 (D. Ariz. 1995) (noting the concern that an inmate may change appearance and evade identification with less stringent grooming policies can be "easily rectified."). Maintaining before and after pictures is also an option the ABA has set forth. *See* American Bar Association, *Standards for Criminal Justice: Treatment of Prisoners* 209 (3d ed. 2011) ("One solution that has been suggested is that the identification card prisoners are required to carry on their person and produce to staff on request matches the prisoner's daily and current appearance—including any coverings—but that a photo without religious head covering is maintained by prison administrators." (citing *Forde v. Zickefoose*, 612 F Supp. 2d 171,

178-79 (D. Conn. 2009))). Thus, if the inmate escaped and shaved his beard, authorities could simply compare his appearance against the photos of the inmate with no beard.

This is not an onerous practice. Digital cameras make it easy and inexpensive for prisons to keep multiple pictures in an inmate's file, and some prisons even charge inmates a nominal fee for taking a new picture. For example, Alaska regularly re-photographs inmates as a matter of policy. *See* Sidhu, 66 U. Miami L. Rev. at 950 n. 161 (citing State Grooming Standards 1 (Rev. Ulli Klemm, Administrator, Religion & Volunteer Services, Bureau of Inmate Services, Pa. Dep't of Corr., ed.) (Dec. 17, 2009) ("If a prisoner drastically changes his or her appearance, e.g., changing hair length or color, shaving, or growing a beard or mustache, the individual shall be re-photographed for purposes of identification.")); *see also* Raj Kumar Singh, *Male Prisoner Hair Law: Analysis and Discussion*, The Raj Singh Collection (1997), http://www.choisser.com/longhair/rajsing3.html (report that in a survey of state prisons, the majority of states that responded said they did not have restrictive hair regulations and yet this "caused them no negativity in the areas of prisoner identification and sanitation/hygiene").

In the experience of *amici*, maintaining before and after pictures of inmates with facial hair is a simple step, and it certainly provides a much more effective security and identification measure than a blanket ban on facial hair. Before the magistrate below, Respondents offered no reason why this com-

mon practice would not provide a workable less restrictive alternative to address identification concerns. *See* J.A. 104, 123. This alternative seems particularly feasible here, where Respondents already require a photograph when an inmate enters the prison, and additional photographs thereafter whenever "the growth or elimination of hair, mustaches, sideburns and/or beard significantly changes [an prisoner's] appearance." Ark. Admin. Code. 004.00.1-I(C)(6).

Second, an inmate who grew a beard for medical reasons could change his appearance just as easily as an inmate who had a beard for religious reasons. Yet Respondents failed to explain why their security concerns do not extend to medical exceptions and why religious exceptions should be treated differently.

Third, with modern prison technology, prisoner escape is a statistically negligible concern. A 2005 study that analyzed prison escapes in the United States from 1988 to 1998 found that approximately 1.4% of the inmate population escaped annually. Of the escapees, the vast majority—88.5%—were "walkaways" from community facilities with minimal supervision. The study showed the escapee percentage declining steadily in the United States, which means the percentage is likely much lower now. *See* Richard F. Culp, *Frequency and Characteristics of Prison Escapes in the United States: An Analysis of National Data*, 85 Prison J. 270, 287 (Aug. 2005); *see also* James Austin & Patricia Hardyman, *Objective Prison Classification: A Guide for Correctional Agencies* 12, U.S. Dep't of Justice, Nat'l Inst. of Corr. (July 2004), *available at* http://nicic.gov/library/019319 ("In gen-

eral, the vast majority of prisoners never become disruptive or difficult to manage. The most serious forms of disruptive behaviors within a prison, such as homicide, escape, aggravated assault on other prisoners or staff, and rioting, are rare events."); Raj Kumar Singh, *Male Prisoner Hair Law: Analysis and Discussion*, The Raj Singh Collection (1997), http://www.choisser.com/longhair/rajsing3.html (estimating that "true escapes" were closer to about "one and one-half tenths of one percent (0.001592)").

In other words, when prison officials prohibit beards as an answer to prison escape, they are relying on an indirect solution to a largely non-existent problem. A far better approach would be to focus on implementing or improving an objective inmate classification system focused on providing solutions more relevant to the particular inmate and prison context. "Security risk assessments measure the likelihood of a prisoner engaging in high-risk behavior or attempting to escape while incarcerated." James Austin & Patricia Hardyman, *Objective Prison Classification: A Guide for Correctional Agencies* 4-5, U.S. Dep't of Justice, Nat'l Inst. of Corr. (July 2004), *available at* http://nicic.gov/library/019319. Thus, had Respondents presented evidence that Petitioner posed a unique escape risk, then heightened grooming restrictions might be warranted. No such evidence, however, was presented below.

C. The Desire to Treat Inmates Alike Is Not a Compelling Government Interest.

The most plausible explanation Respondents articulated for their denial of Petitioner's accommodation request was a desire "to treat all inmates fairly and alike." Resp. Op. Cert. at 3. "[A]llowing Petitioner to maintain a beard, while not affording the same opportunity to other inmates, would elevate Petitioner's status above that of other inmates " *Id.*; *see also* J.A. 186 ("[A]ffording special privileges to an individual inmate could result in his being targeted by other inmates.").

What this argument really boils down to is the natural desire of prison officials to avoid having to make exceptions to their rules. Indeed, when asked about allowing an inmate "to do something that other inmates are not allowed to do," one official responded, "That's the last thing you would want to happen in an institution." J.A. 118. Far from being a new concern unique to Respondents, "[t]he Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006); *see also Religious Liberty Protection Act of 1998: Hearings Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 105th Cong. 2 (1998) (statement of Sen. Orrin Hatch, Chairman, S. Comm. on Judiciary) (Government too often "clings to its creed that, 'rules are rules, no matter the damage done to the individual soul").

As former prison officials, *amici* are sympathetic to the general desire to avoid granting exceptions where possible. Blanket standards and generally applicable rules are easier to administer, even when rules are arbitrary or they lead to unfavorable outcomes.

But *amici* also recognize that, at its very essence, RLUIPA's purpose is to require prisons to make exceptions in some cases. RLUIPA explicitly prohibits burdens on religious exercise "even if the burden results from a rule of general applicability." 42 U.S.C. § 2000cc-1(a); *see also Gonzales*, 546 U.S. at 436 ("But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to 'rule[s] of general applicability.'"). The Ninth Circuit similarly recognized the problematic nature of favoritism arguments under RLUIPA. "[W]e discounted the favoritism argument, since this effect 'is present in every case that requires special accommodations for adherents to particular religious practices.'" *Shakur v. Schriro*, 514 F.3d 878, 886 (9th Cir. 2008) (quoting *Ward v. Walsh*, 1 F.3d 873, 878 (9th Cir. 1993)); *see also Benning v. Georgia*, 864 F. Supp. 2d 1358, 1367 (M.D. Ga. 2012) ("Put simply, any religious accommodation not expressly contemplated by [the Defendants'] standard operating procedure impinges the Defendants' interest in uniformity, yet the Defendants regularly accommodate inmates' religious requests, and they note no adverse effects that have resulted."). Thus, allowing Respondents to allege as a compelling interest a bare desire to avoid exceptions would render RLUIPA meaningless.

D. Political Considerations May Underlie Prison Officials' Resistance to Accommodations of Religious Practices.

Aside from the justifications they explicitly articulated, Respondents actions here may also result from unspoken, but no less significant, influences: the realities of serving as an official in a politically accountable administration. These political realities account, in part, for some positions *amici* took when they were defendants in previous lawsuits—positions different from the personal views *amici* articulate in this brief.[4] Political considerations may well provide a more realistic explanation for the otherwise "almost preposterous" position taken by Respondents in this case. J.A. 155.

Policies adopted by a penal administration are not influenced solely by the science of criminal justice, budgetary constraints, or personal views of prison officials regarding the feasibility or desirability of certain accommodations. Rather, policies are informed, as they must be, by the political environment and voter preferences at the time. For example, in the experience of *amici*, when a Governor adopts new penal policies, he or she is likely to seek and respond to input from many organizations, including district attorneys associations, sheriffs associations, police

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[4] Moreover, the positions of *amici* have continued to evolve in recent years as industry standards have moved towards more individualized analysis of inmate risks and needs, as opposed to one-size-fits-all approaches. These industry standards are discussed in Part I, *supra*.

chiefs, crime victims organizations, and labor unions. Higher-level prison officials are charged with upholding policies developed at the State level without regard to their personal views. Moreover, prison wardens or directors of corrections may themselves be political appointees.[5]

In the experience of *amici*, political pressure from some groups can cause a penal administration to resist inmates' requests for accommodations, regardless of the merit of such accommodations. In California, for example, certain influential organizations, such as the Crime Victims United of California (CVUC), "promote[] an especially retributive brand of crime victims' rights" that views victims and inmates as "locked in a zero-sum grudge match" where "any policy that helps prisoners automatically harms victims and their families."[6] This philosophy, which is

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[5] For example, some high-level prison officials are politically appointed in Arkansas, California, Georgia, and Ohio. *See* Ark. Code Ann. § 12-27-107 ("The Director of the Department of Correction, who shall be the executive, administrative, budgetary, and fiscal officer of the department, shall be appointed by the Board of Corrections . The director shall serve at the pleasure of the Board of Corrections."); Cal. Penal Code § 6050(a) ("The Governor, upon recommendation of the secretary, shall appoint the wardens of the various state prisons. Each warden shall be subject to removal by the secretary."); Ga. Code Ann. § 42-2-6(b) ("The commissioner shall be appointed by and shall serve at the pleasure of the board. Beginning July 1, 1999, the salary of the commissioner shall be set by the Governor and the expenses and allowances of the commissioner shall be as set by statute."); Ohio Const. art. VII, § 2 ("The directors of the penitentiary shall be appointed or elected in such manner as the general assembly may direct.").

[6] Joshua Page, *Prison Officers, Crime Victims, and the Prospects of Sentencing Reform*, California Progress Report (Mar. 22, (continued...)

supported by other political actors as well, motivates policies aimed at "mak[ing] penal facilities more austere" and denying benefits to inmates wherever possible.[7]

While *amici* understand such political pressures, they believe political considerations should not be regarded as a compelling government interest for purposes of RLUIPA. *Cf. Lawrence v. Texas*, 539 U.S. 558, 582 (2003) ("[A] bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review.") Moreover, many other crime victim organizations have recognized that "vengeful, ultra-tough penal policies do not help victims of crime but simply create more suffering and resentment."[8] These other groups instead advocate policies "that challeng[e] offenders to take responsibility for the harm their crimes cause through restorative justice practices and help[] prisoners develop the tools necessary to live crime-free lives "[9] As discussed in the next section, implementation of these more modern and widely accepted rehabilitative philosophies may well provide significant security benefits.

2011), available at http://www.californiaprogressreport.com/site/prison-officers-crime-victims-and-prospects-sentencing-reform.

[7] *Id.*

[8] *See, e.g.*, Joshua Page, *Crime Victims United of California: A Powerful Voice in State Politics*, LA Times (June 3, 2011), http://articles.latimes.com/print/2011/jun/03/opinion/la-oe-page-prison-guards-20110603.

[9] *Id.*

IV. Allowing Inmates to Practice Their Religion May Lead to Security Benefits for Prisons, as Well as Broader Benefits For Inmates and Society as a Whole.

Instead of increasing security concerns, *amici* believe that allowing inmates to practice their religion is likely to result in inmate behavior that alleviates security concerns and contributes to other goals of prison administration. A number of studies indicate that "[r]eligion targets antisocial values, emphasizes accountability and responsibility, changes cognitive approaches to conflict, and provides social support and social skills through interaction with religious people and communities. Such emphases seem to be consistent with what many rehabilitation workers would call principles of effective treatment." Byron R. Johnson, et al., *Religious Programs, Institutional Adjustment, and Recidivism among Former Inmates in Prison Fellowship Programs*, 14 Justice Quarterly 145, 148 (1997) (internal citations omitted).[10] One

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[10] *See also* Thomas P. O'Connor, *A Sociological and Hermeneutical Study of the Influence of Religion on the Rehabilitation of Inmates* (2001) (unpublished Ph.D. dissertation, Catholic University of America), *available at* http://transformingcorrections.com/wp-content/uploads/2011/11/Unpublished-Ph.D.-Dissertation.pdf; Todd R. Clear, et al., *Does Involvement in Religion Help Prisoners Adjust to Prison?*, NCCD Focus (Nov. 1992); Todd R. Clear & Marina Myhre, *A Study of Religion in Prison*, 6 Int'l Ass'n Res. & Cmty. Alts. J. on Cmty. Corrs. 20 (1995); Byron R. Johnson, *Religiosity and Institutional Deviance: The Impact of Religious Variables upon Inmate Adjustment*, 12 Crim. Just. Rev. 21 (1987); Byron R. Johnson, et al., *A Systematic Review of the Religiosity and Delinquency Literature: A Research Note*, 16 J. Contemp. Crim. Just. 32 (2000).

(continued...)

2002 study, for example, found that increased religious involvement—measured by attendance rates at religious services or programs—reduced infraction rates. Thomas P. O'Connor & Michael Perreyclear, *Prison Religion in Action and Its Influence on Offender Rehabilitation*, 35 J. Offender Rehab. 11 (2002) (assessing religious attendance and infraction rates at a medium/maximum security prison in South Carolina). Along the same lines, in a 1992 study, Todd Clear conducted interviews with over 700 inmates in 20 prisons and found that self-reported religiosity is associated with better adjustment to prison, fewer infractions, and less time spent in disciplinary confinement. Todd R. Clear & Melvina T. Sumter, *Prisoners, Prison, and Religion: Religion and Adjustment to Prison*, 35 J. Offender Rehab. 127, 154 (2002).

Anecdotal accounts from prison officials provide further support for the theory that inmates, and prisons, are benefited when inmates are permitted to engage in religious activities. For example, Sheryl Ramstad Hvass, Commissioner of the Minnesota Department of Corrections, noted of inmates participating in religious activity that "changes observed in participating inmates are remarkable" and that these inmates seemed more prepared to "return to

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Even Alexander Volokh, who has criticized the methodology of some studies analyzing "immersion-style faith-based" prisons, has excluded from this criticism "studies that explore more general issues like the effect of 'religiosity,'" by measuring factors such as the religious observance of inmates. Alexander Volokh, *Do Faith-Based Prisons Work?*, 63 Ala. L. Rev. 43, 49-50 (2011).

society" and had "lower recidivism rates." Sheryl Ramstad Hvass, *Faith-Based Programs Offer Hope for the Future, in* Correctional Best Practices: Directors' Perspectives 73-74 (Assoc. of State Corr. Adm'rs, 2000). Hvass found that religion helped these inmates "incorporate[ ] into their daily lives altruistic ethics, virtues and self-control that were all missing in their histories." *Id.* at 75.

Modern theories of prison administration also recognize that benefits can result when inmates are allowed to take responsibility for aspects of their identity, including religiosity. For example, innovative prison administrators such as Dora Schriro, Commissioner of the New York City Department of Corrections, have put forward a "Parallel Universe" concept. Under this theory, prison officials strive to ensure that the values and habits of prison life—including religious practice—match those required to succeed outside of prison. Instead of being treated as docile subjects, inmates are encouraged and enabled to take control of their identities, make many decisions about their daily lives, and be held accountable for their decisions. The Oregon and Arizona Departments of Corrections have followed a similar approach. *See* Todd R. Clear, et al., *American Corrections* 349 (10th ed. 2012); *see also* Dora Schriro, *Getting Ready: How Arizona Has Created a "Parallel Universe" for Inmates*, Nat'l Inst. of Just. J. No. 263 (2009).[11]

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[11] In contrast to these more modern approaches promoting inmate identity and religiosity, some commentators argue that strict grooming policies for inmates have historically been root-
(continued...)

Had Respondents carefully considered the benefits that prisons can realize when inmates are allowed to engage in religious practice and take responsibility for their identities, they might have concluded that security concerns would be reduced and beneficial inmate behavior enhanced by making accommodations for religious liberties where possible.

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ed in draconian methods "of dominating prisoners by humiliating them and stripping them of any vestige of political or cultural identification or religious identity." Deborah Pergament, *It's Not Just Hair: Historical and Cultural Considerations for an Emerging Technology*, 75 Chi.-Kent L. Rev. 41, 57 (1999) (citing Lori B. Andrews, *White Blood, Black Power: The Life and Times of Johnny Spain* (1996)); *see also* Mara R. Schneider, *Splitting Hairs: Why Courts Uphold Prison Grooming Policies and Why They Should Not*, 9 Mich. J. Race & L. 503, 508 (2004) ("[T]he states' purpose for developing these policies actually may be to enforce a degree of conformity among prisoners. In other words, the rationales offered by the states may be pretexts designed to avert the courts' attention away from the true purpose of the policies: to repress individuality and to use the state's coercive power to prevent the practice of unpopular religions within their prisons."); Raj Kumar Singh, *Male Prisoner Hair Law: Analysis and Discussion*, The Raj Singh Collection (1997), http://www.choisser.com/longhair/rajsing3.html ("[T]he forced or coercive elimination of a man's hair ultimately has as its primary purpose the domination, oppression, and physical objectification of the prisoner.").

The desire to repress individuality amongst inmates presumably is not a compelling government interest, and *amici* believe these approaches have yielded no demonstrable benefits for prisons. Moreover, social science research disputes the effectiveness of these techniques. Susan Clark Craig, *Rehabilitation versus Control: An Organizational Theory of Prison Management*, 84 Prison J. 92S, 101S (2004) (discussing a study that found an absence of benefits associated with a control model and noting that many experts have argued that control model prisons are "counterproductive to inmate rehabilitation but also counterproductive to the very control it seeks").

CONCLUSION

For the foregoing reasons, the judgment of the Eighth Circuit should be reversed.

Respectfully submitted,

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May 2014

AMICUS CURIAE BRIEF

No. 13-6827

In The
Supreme Court of the United States

GREGORY HOUSTON HOLT, A/K/A
ABDUL MAALIK MUHAMMAD, PETITIONER

v.

RAY HOBBS, DIRECTOR, ARKANSAS
DEPARTMENT OF CORRECTION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR INTERNATIONAL MISSION BOARD OF THE SOUTHERN BAPTIST CONVENTION, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, ISLAMIC SHURA COUNCIL OF SOUTHERN CALIFORNIA, JEWISH PRISONER SERVICES INTERNATIONAL, LUTHERAN CHURCH—MISSOURI SYNOD, STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.), GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, AND GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST AS AMICI CURIAE IN SUPPORT OF PETITIONER

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BRIEF FOR INTERNATIONAL MISSION BOARD OF THE SOUTHERN BAPTIST CONVENTION, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, ISLAMIC SHURA COUNCIL OF SOUTHERN CALIFORNIA, JEWISH PRISONER SERVICES INTERNATIONAL, LUTHERAN CHURCH—MISSOURI SYNOD, STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.), GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, AND GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST AS AMICI CURIAE IN SUPPORT OF PETITIONER

Amici, religious organizations, respectfully submit this brief as amici curiae in support of petitioner.[1]

INTEREST OF AMICI CURIAE

Amici are religious organizations from a variety of faith traditions that support religious liberty for people of all faiths, including people behind bars. As such, amici have a keen interest in the Court's resolution of this case.

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[1] Letters from the parties granting blanket consent to the filing of amicus curiae briefs have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

The International Mission Board of the Southern Baptist Convention (IMB) is an entity of the Southern Baptist Convention (SBC), the nation's largest Protestant denomination with more than 44,000 churches and 16.2 million members. To achieve its vision of seeing a multitude of every people, tribe, and tongue from around the world come to worship and exalt Jesus Christ as Lord and Savior, IMB employs more than 5,000 Christian workers. One of IMB's core values is to provide all people an opportunity to hear, understand, and respond to the gospel in their own cultural context.

The United States Conference of Catholic Bishops (USCCB) is a nonprofit corporation, the members of which are the active Catholic Bishops in the United States. USCCB advocates and promotes the pastoral teachings of the U.S. Catholic Bishops in such diverse areas of the nation's life as the free expression of ideas, fair employment and equal opportunity for the underprivileged, immigration, protection of the rights of parents and children, the sanctity of life, and the importance of education. Values of particular importance to the Conference include the protection of the rights of religious organizations and their adherents under the First Amendment and related federal statutes, such as RFRA and RLUIPA, and the proper development of this Court's jurisprudence in that regard.

The Islamic Shura Council of Southern California is an umbrella organization of mosques and Muslim organizations, serving more than half a

million Muslims in Southern California. Founded in 1995, the Islamic Shura Council fosters a spirit and culture of working together at all levels in one of the largest and most diverse Muslim populations in the country. In addition, the Islamic Shura Council's Prison Outreach Program serves as an educational resource to the incarcerated and also to prison officials on issues related to Muslims and Islam.

Jewish Prisoner Services International (JPSI) is a volunteer outreach program operated by Congregation Shaarei Teshuvah based in Seattle, Washington. While its primary focus is on pastoral care for Jewish prisoners, releasees and their families, JPSI also provides services to synagogues and rabbis, Jewish social service organizations, correctional agencies, governmental entities, and other faith groups. JPSI's Chairman, Chaplain Gary Friedman, also serves as the communications director of the American Correctional Chaplains Association (ACCA), a religious instructor for the American Jail Association (AJA), and a member of the Religion and Faith-Based Services Committee of the American Correctional Association (ACA).

The Lutheran Church—Missouri Synod (the Synod) is a nonprofit corporation organized under the laws of the State of Missouri. The Synod is a mission-oriented, Bible-based, confessional Christian denomination headquartered in St. Louis, Missouri. Founded in 1847, the Synod has more than 2.3 million baptized members in some 6,200 congregations and more than 9,000 pastors. The Synod has a keen

interest in protecting religious liberty generally, and in particular supporting the Free Exercise Clause of the First Amendment and full protection under the RLUIPA.

Gradye Parsons, as Stated Clerk of the General Assembly, is the senior ecclesiastical officer of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is a national Christian denomination with nearly 1.85 million members in more than 10,000 congregations, organized into 173 presbyteries under the jurisdiction of 16 synods. Through its antecedent religious bodies, it has existed as an organized religious denomination within the current boundaries of the United States since 1706. This brief is consistent with the Constitution of the Presbyterian Church (U.S.A.) and policies of the General Assembly of the Presbyterian Church (U.S.A.) regarding the Free Exercise Clause of the First Amendment. The religious liberty guarantee of this clause is foundational to our understanding of the relationship between the church and state. The General Assembly does not claim to speak for all Presbyterians, nor are its decisions binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of respect and prayerful consideration of all the denomination's members.

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day

Adventist church and represents nearly 59,000 congregations with more than 18 million members worldwide. In the United States, the North American Division of the General Conference oversees the work of more than 5,200 congregations with more than one million members. The Seventh-day Adventist Church has a strong interest in ensuring that government officials do not discriminate against religious expression and a long history of defending the rights of people of all faiths.

The General Synod of the United Church of Christ is the representative body of the national setting of the United Church of Christ (UCC). The UCC has approximately 5,100 churches in the United States, with a membership of approximately one million. The General Synod has a rich heritage of promoting religious freedom and tolerance, and in 2011 passed a resolution challenging anti-Muslim activities.

INTRODUCTION AND SUMMARY OF ARGUMENT

Religious practice is a vital rehabilitative tool for many prisoners and an effective means of reducing prison violence and lowering rates of recidivism. Of course, religious liberty for prisoners is more than just good public policy, it is a fundamental right. The freedom to practice and profess one's religious beliefs is a basic human right that the framers sought to protect. This Nation was founded on the principle that all manner of faith communities would be free not just to exist but to thrive in the diverse fabric of American life. Amici are beneficiaries of that legacy.

Today religious freedom is among our Nation's most prized civil liberties. And while, in the context of correctional institutions, certain freedoms understandably must be curtailed to preserve order and safety, the framework articulated by Congress in the Religious Land Use and Institutionalized Persons Act (RLUIPA) accounts for order and safety concerns. For all of the reasons stated by petitioner, which amici support and hereby adopt, such concerns are not implicated where, as here, petitioner, an observant Muslim, seeks merely to grow a one-half inch beard in accordance with his religious beliefs. Concluding otherwise would erode RLUIPA and open the door to further limiting protections of religious exercise on both sides of prison walls.

Amici, as communities of faith from diverse religious traditions, are committed to safeguarding religious liberty for all citizens, including prisoners.

ARGUMENT

A. Religious Liberty Is A Basic Principle Of Human Freedom That Extends To Prisoners

Although there is a wide variety of religions and vast disagreement among faiths, there is broad consensus that religious liberty is a basic human right. *See* James E. Wood, Jr., *The Relationship of Religious Liberty to Civil Liberty and a Democratic State*, 1998 BYU L. REV. 479, 484 (1998). Indeed, few would dispute that the right to free exercise of religion deserves primacy of place in the First Amendment.

However, once one moves past the lofty rhetoric of religious liberty as America's "first freedom," a more important question emerges: how serious is the American government about protecting the religious exercise of its citizens in practice? RLUIPA—passed without a dissenting vote—represents Congress' emphatic declaration that America is committed to going beyond patriotic platitudes about religious liberty and has the legal and political will to limit State power that would interfere with the religious conscience of its citizens.

RLUIPA does this by ensuring that the core principle of religious freedom—that the State should not impose burdens that interfere with the religiously informed conscience of its citizens, 42 U.S.C. § 2000cc-1(a) (2006)—is not just for the powerful, the

virtuous, or citizens who are members of mainstream religions. Instead, by protecting the religious liberty of *prisoners*, RLUIPA signals that religious liberty in America extends even to the politically powerless, to the lawbreaker, and to those citizens whose religious practice may lie far outside the mainstream. Even in the prison context, where governmental authority to exercise coercive power limiting the freedom of its citizens is at its zenith, RLUIPA mandates that the State must "use its strength not to coerce, but to *protect* the conscience of the members of our society who are seemingly the least worthy of such protection: prisoners." Derek Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501, 607 (2005) (emphasis in original); *cf. Hudson v. Palmer*, 468 U.S. 517, 523-524 (1984) ("[T]he way a society treats those who have transgressed against it is evidence of the essential character of that society."); Fyodor Dostoyevsky, The House of the Dead 76 (Constance Garnett trans., 1957) ("The degree of civilization in a society can be judged by entering its prisons.").

Thus, Congress chose to pass RLUIPA in order to safeguard prisoners' religious liberty out of "a growing concern among inmates, clergy, prisoners' rights advocates, and members of Congress that prisoners were being unfairly prevented from practicing their faiths." Gaubatz, *supra*, at 510. This Court recognized Congress' concern, finding that "RLUIPA's institutionalized-persons provision * * * alleviates exceptional government-created burdens

on private religious exercise." *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005). RLUIPA's drafters "resist[ed] the temptation to strip protection from the most politically powerless, including prisoners and inmates," *Issues Relating to Religious Liberty Protection, and Focusing on the Constitutionality of a Religious Protection Measure: Hearing Before the S. Comm. on the Judiciary*, 106th Cong. 4 (1999) (statement of Steven T. McFarland, Director, Christian Legal Society's Center for Law and Religious Freedom), and instead mandated that only the showing of a compelling government interest implemented through the means least restrictive of religious exercise would justify imposing a burden on a prisoner's religious exercise. 42 U.S.C. § 2000cc-1(a).

As petitioner's brief demonstrates, the lower court appears to have applied a watered-down version of RLUIPA's statutorily mandated strict scrutiny test to dismiss appellant's religious exercise claim. Pet'r Br. at 42-55. Any inclination to affirm such a diluted approach to RLUIPA's protections would fly in the face of not only RLUIPA's plain language, 42 U.S.C. § 2000cc-3(g) (2006) (RLUIPA "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution"), but also the more fundamental commitment to religious liberty that motivated RLUIPA's passage.

"RLUIPA recognizes that although it is proper for the State to punish individuals who have violated the laws of our society by imprisoning them, the State

does not have the right to seek to bind and control the religious beliefs and acts of conscience of those individuals." Gaubatz, *supra*, at 607. Giving force to the religious liberty claims of prisoners under RLUIPA is ultimately a means to reaffirm "the traditional American view of government, reflected from the very birth of the Nation in the Declaration of Independence, that each individual," even a prisoner, is important because a Creator "endowed him with certain inalienable rights—including the fundamental right to free exercise of religion and conscience." *Ibid.*; *cf. Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011) ("The basic concept underlying the [principle that prisoners retain certain rights] is nothing less than the dignity of man.") (internal quotation marks omitted); Editorial, *Prisons and American Values*, L.A. TIMES, Aug. 7, 2013 ("Our treatment of prisoners, even the most dangerous and irredeemable, is a fundamental expression of American values.").[2]

In short, interpreting RLUIPA so that it adequately protects the religious exercise and conscience of even those members of society considered to have the fewest rights—prisoners—this Court will "follow[ ]

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[2] While it is beyond the scope of this brief for amici to take a position on any matters relating to petitioner's underlying conviction and sentence, amici do not dispute the general principle that it is often appropriate for the State to impose punishment that deprives convicted defenders of their physical liberty. However, amici fully support petitioner's claim that the State has gone too far by seeking to add to this deprivation of liberty the interference with his ability to exercise his faith.

the best of our traditions" by "respect[ing] the religious nature of our people and accommodat[ing] the public service to their spiritual needs." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).[3]

B. Religious Practice Has Long Played An Important Role In American Prisons

This case presents questions regarding the scope of religious protections for prisoners under the First Amendment and RLUIPA. To understand the importance of affording prisoners such protections, one must examine the long history, broad scope, and substantial beneficial effects of prisoners' religious practice. Research shows that religious practice behind

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[3] Notably, throughout history, many classic expressions of religious exercise have occurred in or from prison. The prophet Jeremiah continued to prophesy while in prison, and his prophecies are recorded in Jewish and Christian sacred texts. *See Jeremiah* 20, 37 (Revised Standard Version) (RSV). The Apostle Paul famously continued to express and act on his faith in prison, *see Acts* 16:16-40, 28:16-31 (RSV), and large sections of the New Testament were written as an exercise of his faith while he was imprisoned. *See, e.g.*, *Colossians*; *Ephesians*; *Philemon*. The Pilgrim's Progress, one of the most widely read works of Protestant Christian faith after the Bible, was written by John Bunyan in prison in the 1670s. *See Memoirs of the Life and Conversion of Mr. John Bunyan*, *in* The Pilgrim's Progress i, vii (1836). Centuries later, the Reverend Martin Luther King, Jr. continued to exercise his religious faith from prison. *See* Martin Luther King, Jr., *Letter from a Birmingham Jail*, *in* Liberating Faith: Religious Voices for Justice, Peace, and Ecological Wisdom 177 (Roger S. Gottlieb ed., 2003). Although certainly not exhaustive, these examples suggest what could be lost if the government were given free rein to suppress the exercise of religious conscience by prisoners.

bars, such as the practice at issue here, benefits prisoners, prisons, and communities beyond prison walls.

Religion is not a novel concept in corrections. Criminal justice and religious scholars agree that religion has long influenced societal thinking about criminality, punishment, and rehabilitation. *See, e.g.*, Harry R. Dammer, *The Reasons for Religious Involvement in the Correctional Environment*, 35 J. OFFENDER REHABILITATION 35, 35-36 (2002) (tracing church involvement in corrections to "the days of Constantine" and "medieval times"); Jennifer Graber, *Prisons and Religion in the Americas*, 7 RELIGION COMPASS 532 (2013) (reviewing scholarship on prisons and religion by historians, sociologists, anthropologists, theologians, and ethicists); *see also Barnett v. Rodgers*, 410 F.2d 995, 1002 (D.C. Cir. 1969) ("Religion in prison subserves the rehabilitative function by providing an area within which the inmate may reclaim his dignity and reassert his individuality."). This is particularly true in the United States where, in the late eighteenth century, religion was a driving force behind "the creation of a new U.S. penal system * * * that had rehabilitation as its goal and prison as its method." Thomas P. O'Connor et al., *Criminology and Religion: The Shape of an Authentic Dialogue*, 5 CRIMINOLOGY & PUB. POL'Y 559, 561 (2006).

Reformers developed the first American prisons as a more humane and "more Christian alternative to * * * the casual brutality of corporal punishment as practiced in Europe." Winnifred Fallers Sullivan,

Prison Religion: Faith-Based Reform and the Constitution 4 (2009). As the name "penitentiary" suggests, these institutions were designed, in part, to provoke repentance and atonement on the part of offenders. *See* Todd R. Clear & Melvina T. Sumter, *Prisoners, Prison, and Religion: Religion and Adjustment to Prison*, 35 J. OFFENDER REHABILITATION 125, 126 (2002) ("[T]he word 'penitentiary' is itself derived from 'penitence,' meaning 'regret for wrongdoing or sinning.'"). For example, the Quaker reformists who founded the first American penitentiary in Philadelphia "believed that the penitentiary would provide a place of penitence where the convict, alone in his cell with only the Bible to comfort him, would necessarily 'be compelled to reflect on the error of his ways, to listen to the reproaches of conscience, to the expostulations of religion.'" Melvin Gutterman, *Prison Objectives and Human Dignity: Reaching a Mutual Accommodation*, 1992 BYU L. REV. 857, 862 (1992) (quoting George W. Smith, A Defence of the System of Solitary Confinement of Prisoners 75 (1833)).

American penitentiary reforms received international attention, particularly from Europe. Commissioned by the French government to study "the theory and practice of the penitentiary system in the United States," Alexis de Tocqueville and Gustave de Beaumont reported approvingly that "[i]n America, the progress of the reform of prisons has been of a character essentially religious." Gustave de Beaumont & Alexis de Tocqueville, On the Penitentiary System in the United States and Its Application

in France xlvii, 93 (1833). Indeed, Tocqueville and Beaumont characterized religion as "one of the fundamental elements of discipline and reformation" in newly built American prisons. *Id.* at 93 ("[I]t is [religion's] influence alone which produces complete regeneration; and even with regard to reformations less thorough, we have seen that it contributes much to obtain them.").

Religion's influence on corrections policy and programming has continued over time to the present day. *See* Clear & Sumter, *supra*, at 126. Indeed, religion may have "been employed more frequently than any other type of correctional intervention" in penal history, *ibid.*, and religious programming remains pervasive in American prisons. Byron R. Johnson, *Religious Programs and Recidivism Among Former Inmates in Prison Fellowship Programs: A Long-Term Follow-Up Study*, 21 JUST. Q. 329, 330 (2004). In recent years, scholars have increasingly turned their attention to the relationship between religion, crime, and rehabilitation.

Emerging empirical research suggests that there are significant societal benefits to accommodating religious practice in prisons. It is therefore counterproductive as a matter of public policy to interfere with prisoners' religious observance. Scholars now consistently find that "religious beliefs are inversely related to delinquency, crime and recidivism." Jeanette Hercik, Dep't of Health & Human Servs., Prisoner Reentry, Religion and Research 4 (2004), *available at* https://peerta.acf.hhs.gov/pdf/prisoner_

reentry.pdf. For example, a long-term study of adult male prisoners in New York State found that inmates who frequently engaged in Bible studies were significantly less likely to be rearrested in the first few years following release. Johnson, *supra*, at 351-352.

Studies also show that protecting inmates' religious practice leads to safer prisons. Inmates who are actively involved in religious activities, like petitioner, violate prison rules less frequently than their non-religious peers. *See* Thomas P. O'Connor & Michael Perreyclear, *Prison Religion in Action and Its Influence on Offender Rehabilitation*, 35 J. OFFENDER REHABILITATION 11, 11 (2002) (finding "an inverse relationship between intensity of religious involvement and the presence or absence of in-prison infractions"); Clear & Sumter, *supra*, at 147 ("Higher levels of inmate religiousness are associated with fewer self-reported disciplinary confinements."). Religious inmates are also less likely to engage in dangerous behaviors such as arguing and fighting. Kent R. Kerley et al., *Religiosity, Religious Participation, and Negative Prison Behaviors*, 44 J. SCI. STUDY OF RELIGION 443, 453 (2005). Indeed, one study found that "[b]elief in a higher power reduced the likelihood of inmates getting into frequent arguments by over 70 percent." *Ibid.*

These research findings confirm what correctional administrators have long recognized, namely "the vital role played by most religious practices and beliefs in * * * enhancing overall institutional safety and well-being." *Issues Relating to Religious Liberty*

Protection, and Focusing on the Constitutionality of a Religious Protection Measure: Hearing Before the S. Comm. on the Judiciary, 106th Cong. 175 (1999) (statement of Glenn S. Goord, Comm'r, New York State Dep't of Corr. Servs.). "Most inmates who sincerely practice their religious beliefs," like petitioner, "do not pose institutional problems. Rather, as a rule of thumb, they promote institutional stability." *Ibid.*

As an added benefit, religious practice helps inmates adjust to prison and leads to improved health outcomes. A study of 769 inmates housed in 20 prisons across 12 states found that "higher levels of inmate religiousness are associated with better psychological adjustment to the prison environment." Clear & Sumter, *supra*, at 126. Among the general population, studies of "religious practices and health outcomes indicate[] that higher levels of religious involvement are associated with: reduced hypertension, longer survival, less depression, lower levels of drug and alcohol use and abuse, * * * [and] reduced likelihood of suicide." Byron R. Johnson, Ctr. for Research on Religion & Urban Civ. Soc'y, Objective Hope: Assessing the Effectiveness of Faith-Based Organizations 7 (2002). Prisoner-specific studies corroborate the connection between religious practice and improved mental health. "Religious inmates * * * report generally lower levels of depression and higher levels of self-esteem and self-mastery than non-religious inmates." Clear & Sumter, *supra*, at 148.

Congress understood these benefits when enacting RLUIPA, *see* Gaubatz, *supra*, at 510-512 (detailing

RLUIPA's legislative history and testimony concerning the effects of religious practice on recidivism and rehabilitation), and appropriately calibrated the protection of religious exercise in RLUIPA so that these benefits could be fully realized. Reversal of the lower court's unduly narrow reading of RLUIPA's protections would affirm Congress' intent. It would also fall comfortably within the American tradition of respecting religion's integral role in the life of so many prisoners.

C. Religious Practice Connects Communities Of Faith On Both Sides Of Prison Walls

Religious accommodations for prisoners also protect and acknowledge faith communities outside of prison walls. Shared religious practice connects prisoners and their respective communities of faith, and these connections are vitally important to communities and prisoners alike.

For many faith communities, aiding prisoners is an important part of religious practice. In Christianity, for example, there is a "deeply-rooted and continuing religious tradition * * * of ministry of relief to the imprisoned." Carolyn Osiek, *The Ransom of Captives: Evolution of a Tradition*, 74 HARV. THEOLOGICAL REV. 365, 385 (1981). The New Testament specifically exhorts followers to "[r]emember those who are in prison, as though in prison with them." *Hebrews* 13:3 (RSV). This includes visiting and aiding prisoners, actions that scripture suggests are fundamental Christian virtues. Indeed, in a parable of the Last

Judgment, Jesus mentions visiting prisoners as one of the actions characteristic of the righteous. *Matthew* 25:36 (RSV) ("I was in prison, and you came to me."). Jesus speaks in the first person, as though his followers visited him personally. When the followers express confusion, Jesus explains that by caring for others, it is as though the followers have cared directly for him: "Truly, I say to you, as you did it to one of the least of these my brethren, you did it to me." *Matthew* 25:40 (RSV).

Judaism and Islam, too, share traditions of caring for prisoners. In Judaism, the precept of *ahavat yisrael* encompasses love for one's fellow Jew and for all humankind, including those behind bars. *See, e.g., Protecting Religious Freedom After Boerne v. Flores (Part III): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 37-44 (1998) (statement of Isaac M. Jaroslawicz, Director of Legal Affairs, Aleph Institute) (discussing Jewish outreach to prisoners). Islamic teachings embrace similar themes of good will. The Quran exhorts followers to "feed, for the love of God, the indigent, the orphan and the captive." 76:8. Implied in this Divine mandate, God commands believers not only to fulfill the physical needs of indigents, orphans, and captives but also to provide them with spiritual nourishment. Because captivity—be it physical, moral, or economic—limits the ability to seek and restore one's soul, it is particularly important that believers help prisoners to make

themselves whole. *See, e.g.*, Abdullah Yusuf Ali, The Meaning of the Holy Quran 1572 n.5839 (2010).

Thus, the ability to minister to and connect with prisoners through shared religious practice is of great consequence to many faith communities. Congress recognized as much when it passed RLUIPA—lawmakers viewed the legislation "as a way to remove state-imposed barriers from those seeking to minister to prisoners" and to ensure that prison administrators allowed clergymen and religious leaders "to conduct their ministries effectively" behind bars. Gaubatz, *supra*, at 511-512.

Research shows that faith connections formed across prison walls are also consequential for prisoners, particularly on release. The connections formed between inmates and faith communities while inmates are incarcerated help facilitate their transition back to civil society. *See, e.g.*, Jeanette Hercik et al., Office of Justice Programs, U.S. Dep't of Justice, Development of a Guide to Resources on Faith-Based Organizations: Final Report 28 (2004) ("[R]eligion can promote the development of a moral community within a penal institution, where inmates can be integrated into a church community and receive mentoring and support following release."). Because faith communities "draw on religious traditions that affirm the values of human life, community, and faith," they "may be uniquely equipped * * * to deal with the social and emotional challenges faced by recently released prisoners." Omar M. McRoberts, Urban Institute, *Religion, Reform, Community:*

Examining the Idea of Church-based Prisoner Reentry 3 (Mar. 2002); *see also* Ctr. for Faith-Based & Cmty. Initiatives, U.S. Dep't of Labor, Ready4Reentry: Prisoner Reentry Toolkit for Faith-Based & Community Organizations 1 (2008), *available at* http://www.doleta.gov/PRI/PDF/Pritoolkit.pdf ("Oftentimes, faith-based and community organizations * * * are uniquely well positioned to provide quality transitional services to men and women returning from prison."). Shared religious practice allows faith communities and inmates to begin building strong, supportive relationships prior to release.

CONCLUSION

RLUIPA should be vigorously enforced not just as a matter of basic human rights and civil liberties, but also as a matter of sound public policy. It is counter-productive to interfere with religious observance by prisoners given that such observance leads to safer prisons and safer communities. For the foregoing reasons and those in the brief for petitioner, the judgment of the Eighth Circuit should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-6827

In the

Supreme Court of the United States

GREGORY HOUSTON HOLT
A/K/A ABDUL MAALIK MUHAMMAD,
Petitioner,

v.

RAY HOBBS, DIRECTOR
ARKANSAS DEPARTMENT OF CORRECTION, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF ISLAMIC LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici are scholars of Islamic history and culture, with particular expertise on Islamic law and jurisprudence.[1] Jonathan A. Brown is Associate Professor of Islamic Studies and Muslim-Christian Understanding at Georgetown University. Khaled M. Abou El Fadl is the Omar and Azmeralda Alfi Professor of Law at the UCLA School of Law. John L. Esposito is University Professor and Professor of Religion and International Affairs and of Islamic Studies at Georgetown University. Mohammad Fadel is Canada Research Chair for the Law and Economics of Islamic Law and Associate Professor of Law at the University of Toronto Faculty of Law. Ingrid Mattson is the London and Windsor Community Chair in Islamic Studies at Huron University College at the University of Western Ontario.[2]

This case raises important questions of law, but it also raises important questions about religion and Islam in particular. Petitioner here claims a right to wear a beard in conformity with his Muslim beliefs. But much about these beliefs—their origins, their historical evolution, their significance within Islam—may be unfamiliar to the Court. Much about

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[1] Counsel for *amici* certifies that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. Letters of consent from both parties to the filing of this brief have been filed with the Clerk.

[2] *Amici* file this brief in their personal capacities as scholars. None of their respective universities takes any position on the issues in this case.

Islam has been misunderstood in the West, sometimes with unfortunate consequences. With the aim of assisting the Court in these matters, *amici* respectfully submit this brief.

SUMMARY OF ARGUMENT

Petitioner here seeks a right to wear a beard consistent with his Muslim beliefs. Throughout the litigation, he has claimed support in a traditional Islamic set of sources, known as the hadith. *See, e.g.*, Pet. Br. at 5-6; J.A. at 18 (Pl.'s Compl.); J.A. at 54, 58, 63 (Pl.'s Testimony before the Magistrate Judge). Such a perceived obligation to follow the hadith, *amici* explain, is a common belief among Muslims and has a long established theological and historical warrant. *Amici* point out some of the many hadith requiring beards, and explain how these hadith are widely followed by observant Muslims across the various schools of Islam.

ARGUMENT

I. THE PROPHET MUHAMMAD, THE SUNNAH, AND HADITH

To understand Islam, and to understand the role of hadith within Islam, one begins with the Prophet Muhammad. Muhammad's role in the historical development of Islam is something almost everyone knows. The Quran was revealed over a period of several decades to Muhammad and Muhammad alone. And while the Muslim community would eventually grow to over a billion people worldwide, it began as a small group of Muhammad's personal associates. Historically then, Islam organizes itself around Muhammad's life. But

Islam revolves around Muhammad in ways deeper still.

The Shahada, thought of often as the first Pillar of Islam, is the closest thing there is to a creed for Muslims. The first phrase of it, 'There is no god but God,' is well-known. "But there is a second clause that must also be uttered before one is a true Muslim: 'Muhammad is the Messenger of God.'" FREDERICK M. DENNY, AN INTRODUCTION TO ISLAM 150 (4th ed. 2011) (hereinafter "DENNY, AN INTRODUCTION TO ISLAM"); JONATHAN A.C. BROWN, HADITH: MUHAMMAD'S LEGACY IN THE MEDIEVAL AND MODERN WORLD 16 (2009) (hereinafter "BROWN, HADITH") ("In Islam, religious authority emanates from God through His Prophet."). The idea that Muslims worship Muhammad is a regrettable caricature and a poor one at that; Muslims regard the worship of any human being, including even the Prophet, as idolatrous. But it is undeniably true that, for Muslims, the Prophet Muhammad stands alone among human beings:

> It is as difficult to imagine Islam without Muhammad as Christianity without Jesus, even though the two play very different roles in the religions that they founded and have different places in doctrine and practice. Both, however, were so close to the source of their inspiration and so thoroughly dominated by it that in their words and gestures people have discerned clues and demonstrations of divine activity in the historical process. For Christians, Jesus shows how God behaves among his creatures. Muhammad's life is exemplary in showing

> people how they should behave in the presence of God.

DENNY, AN INTRODUCTION TO ISLAM, *supra*, at 150.

The middle sentence in the above paragraph illustrates something important: By examining Muhammad's words and gestures, Muslims discern clues about how God wants them to live out their own lives. The word Sunnah (sometimes Sunna), the Arabic word for custom, is not widely known in the West. But it has tremendous importance within Islam. In the years before Muhammad, it referred to a person's statements and actions. But the word took on additional meaning with the birth of Islam. Muslims used the word to refer particularly to Muhammad, and it developed a normative aspect: "[I]t became a special term that denoted the category of exemplary words, deeds, and gestures that were destined to be authoritative in the life of the umma [the Muslim community]." DENNY, AN INTRODUCTION TO ISLAM, *supra*, at 151; *see also* FREDERICK M. DENNY, ISLAM AND THE MUSLIM COMMUNITY 64 (1987) (hereinafter "DENNY, ISLAM AND THE MUSLIM COMMUNITY") ("*Sunna* contains an implicit imperative .).

As one scholar explains:

> The Quran is not a detailed legal manual. Only about five hundred of the book's verses provide legal injunctions, and even on major questions such as ritual prayer the Quran is often vague. For both Sunni and Shiite Islam, the Prophet's Sunna has thus proven an essential resource for explaining and supplementing the Quranic message. As the

> Companion [of Muhammad] 'Imran b. Husayn supposedly told a person who wanted to take religious law only from the Holy Book and not from the Sunna, 'Indeed you are an idiot, do you find in the Book of God prayer explained!? Do you find in it fasting explained!? Indeed the Quran ordains this, but the Sunna explains it.'

BROWN, HADITH, *supra*, at 150; JONATHAN A.C. BROWN, MUHAMMAD: A VERY SHORT INTRODUCTION 103 (2011) (hereinafter "BROWN, MUHAMMAD") (noting that "even practices as fundamental as the five daily prayers are found nowhere in the holy book [the Quran]," but are instead found in the Sunnah).

> As the lens through which the Quran was understood, the Sunna of the Prophet has controlled the way in which Muslims have interpreted the Quranic revelation. Although no Muslim would claim that the word of Muhammad is *ontologically* equal or superior to the word of God, early Sunnis long ago acknowledged that 'the Sunna came to rule over the Quran, it is not the Quran that rules over the Sunna.' This was not in any way an admission of any deficiency in the Quran—rather it recognizes that the book required the Prophet's example and teaching in order to explain its verses and unlock its manifold meanings

BROWN, HADITH, *supra*, at 150-51; *see also id.* at 3 ("Among Western readership, the question 'What does Islam say about' some issue is usually followed

by references to the Quran Yet the Quran is not the source to which a curious reader should refer to answer the question ").

The Prophet's example and teaching are important to Muslims for a variety of reasons. They are seen through the lens of religious duty, to be sure: Seeing the Prophet as sinless, Muslims see compliance with the Sunnah as a sure path toward living a life pleasing to God. *See* MOHAMMAD HASHIM KAMALI, SHARI'AH LAW: AN INTRODUCTION 20 (2008) (noting the assessment, a millennia ago, that "every single chapter of fiqh [law] finds its origin in the Qur'an, which is then explained and elaborated by the Sunnah"). But they also experience the Sunnah as a source of meaning apart from duty: "[T]he Prophet's persona is the earthly pivot of faith and Muslim communal identity." BROWN, MUHAMMAD, *supra*, at 105.

This kind of emulative reverence is not unique to Islam. Jesus's example has, quite understandably, extraordinary weight for Christians, *see* HEBREWS 12:1-2 ("[L]et us also lay aside every weight and the sin that clings so closely looking to Jesus the pioneer and perfecter of our faith."), and there are instructive analogies in Judaism as well, *see* BROWN, MUHAMMAD, *supra*, at 71-72 (noting that just as "the rabbis of late antiquity were viewed as living examples of how the Torah should be lived in daily life" and just as "[t]heir students copied how they bathed and ate," so also "Muhammad's Companions too looked to the minutest details of his conduct for insights into the behavior and lifestyle that most pleased God").

This brings us to the hadith:

> The Sunnah of the Prophet was transmitted from [Muhammad] primarily through Hadiths, or reports about Muhammad's words and deeds. Recalled by the Prophet's Companions, Hadiths were transmitted from them by their students. This second generation of Muslims began setting down hadiths, which had until then generally been transmitted orally, in written form in the early 700s [after Muhammad's death in 632]. Along with the Quran, the legal writings of the Companions and the legal opinions of the early *ulama* [Muslim scholars], Hadiths became a major component in the Muslim effort to answer the question that lies at the heart of the Shariah: 'Which actions are pleasing or displeasing to God?'

BROWN, MUHAMMAD, *supra*, at 103. This accurately states the sometimes confused relationship between Sunnah and hadith. The Sunnah is the overall precedent and teachings of the Prophet; the hadiths are the records of the particularities of that precedent and those teachings. Muslims imitate the Sunnah of the Prophet; they discern that Sunnah through the hadiths.[3]

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[3] Given that the distinction between Sunnah and hadith is subtle and unfamiliar, courts should be forgiven for their occasional imprecision. *See, e.g., Nat'l Group for Comms. and Computers, Ltd. v. Lucent Tech. Intern., Inc.*, 331 F.Supp.2d 290, 294 (D.N.J. 2004) (referring to "the recorded examples of the acts and words of Muhamm[a]d, known as the 'Sunnah'").

II. THE ROLE OF HADITH IN ISLAM

A. The Development of Hadith Studies

Yet the relationship between Sunnah and hadith is more complicated than it first appears. One way to explain that complication—which simultaneously goes to explain why Sunnah and hadith are different—is by turning to certain historical events within Islam. Shortly after Muhammad's death, Islam fractured in a series of disruptive civil wars. The Quran had been codified before these wars—almost immediately upon Muhammad's death—so questions about its authenticity were fairly easy for Muslims to put aside. But the process of formal codification for hadith happened slower and later. This created a problem with which Islam had to wrestle—the problem of false hadith. Consider the following:

> When civil war broke out openly between 'Ali [whose faction would later become known as Shi'a Muslims] and the then governor of Syria and future founder of the [Sunni] Umayyad dynasty, Mu'awiya b. Abi Sufyan, both sides waged a propaganda war using the Prophet's words as ammunition. 'Ali's supporters falsely claimed that Muhammad had said, '*If you see Mu'awiya ascend my pulpit, then kill him*,' while Mu'awiya's side countered by forging hadiths such as '*It is as if Mu'awiya were sent as a prophet because of his forbearance and his having been entrusted with God's word.*'

BROWN, HADITH, *supra*, at 70; DENNY, AN INTRODUCTION TO ISLAM, *supra*, at 155 ("The hadith

experts of Islam have been well aware since earliest times that many hadiths were fraudulent.").[4]

This posed an issue for observant Muslims: How could they know for sure whether the Prophet had really done or said something attributed to him in a hadith? "For example, if a Hadith says 'the People in Islam with the greatest share of glory will be the Persians,' is this a forgery by some Persian nationalist or really something that the Prophet knew would be true (the Persians have certainly been at the vanguard of Islamic thought)?" BROWN, MUHAMMAD, *supra*, at 104.

The solution lay in an intricate scholastic system of Hadith criticism that developed over the course of several centuries. Muslim scholars strove to make accurate determinations about the authenticity of each individual hadith. Recognizing that authenticity often could not be determined solely on the basis of a hadith's contents (called matn), Muslim scholars also worked to form judgments based on a hadith's transmission chain (called isnād, the Arabic word for support).[5]

Examining both isnād and matn together, scholars evaluated the authenticity of individual

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[4] And the possibility of intentional fraud, as Muslim scholars of this era knew well, comes on top of the other risks normally associated with hearsay—even honest people can misstate something, or misremember it, or subconsciously distort it. *See* BROWN, HADITH, *supra*, at 7 ("As in a game of 'Telephone,' a report could mutate as it was passed from person to person.").

[5] Precisely because everyone had become aware of the risk of fraud, hadith were transmitted from one person to another with both isnād and matn. *See* ANDREW RIPPIN, MUSLIMS: THEIR RELIGIOUS BELIEFS AND PRACTICES 47-51 (4th ed. 2012) (providing examples).

hadith. They worked to collect information about every individual listed as a link in the chain in all the various isnāds. Transmitters were ranked along two dimensions—their moral character ('adl) and their literary accuracy (dabt)—and sorted on a finely graded spectrum, with categories ranging from reliable (thiqa) at the top to liar (kadhdhab) at the bottom. *See* BROWN, HADITH, *supra*, at 84 (explaining the intermediate categories like "sincere," "lenient," "not strong," "weak," and others).[6]

Isnāds could be rejected for other kinds of reasons too. Hadiths with incomplete isnāds were judged unreliable, as were hadiths with transparently false isnāds. *See* DENNY, AN INTRODUCTION TO ISLAM, *supra*, at 153 (noting that even if two individuals had been judged as being of the highest reliability, if it was established that they lived in different places and never crossed paths, then any hadith purporting to be a communication from one to the other had to be rejected). Short isnād chains tended to be more reliable, because fewer links in the chain meant less risk of error. But dramatically short isnād chains provoked suspicion, and hadith with impossibly short isnād chains had to be rejected too. *See* BROWN, HADITH, *supra*, at 47-48.

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[6] To give an example of how hadith scholars could make such determinations: Say a scholar noticed several hadith on a common topic with a common link in the chain—say they all involved a teacher (X) who passed on information to three different disciples (A, B, and C), resulting in three separate hadith. The matn of the separate hadith could then be compared. If the accounts derived from A and B matched up perfectly, but the account derived from C was different, this suggested that either C or someone chronologically later in his chain was unreliable. *See* BROWN, HADITH, *supra*, at 30.

Hadith were also sometimes rejected on the basis of their matn. "Reports that were illogical, exaggerated, fantastic, or repulsive or that contradicted the Quran were considered suspect." JOHN L. ESPOSITO, THE OXFORD DICTIONARY OF ISLAM 102 (2003). And most crucially, matn were compared to each other; a matn with one source chain could be corroborated by identical matn with different source chains.

Just as individuals were graded regarding their reliability, hadiths were graded regarding their authenticity from sahih (sound) to da'if (unsound), again with a number of intermediate categories like hasan (fair). *See* BROWN, HADITH, *supra*, at 100-01.[7]

In this way, hadith study developed into a nuanced and elaborate field of inquiry—a science of a sort. *See* DENNY, AN INTRODUCTION TO ISLAM, *supra*, at 154 (referring to the "sophisticated complexity" behind the evaluation of hadith that "can only be hinted at here"). Of course this is not to say that hadith study should be thought of as the equivalent of modern-day historical criticism. There are similarities, to be sure. "Both are critical, in that they concern themselves with questions of the reliability of historical sources " BROWN, HADITH, *supra*, at 199. But the differences are pronounced. As faithful Muslims, hadith scholars of this era implicitly tended to assume the reliability of hadith (absent contrary evidence). Modern academic historians generally start with the opposite premise:

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[7] These intermediate categories meant that some hadith might be legitimately used for one purpose but not for another. *See* BROWN, HADITH, *supra*, at 102 ("[H]adiths that were not reliable enough to be admitted in discussions of law could still be used for other purposes . [such as] good manners").

"[T]he default setting for [these] scholars [i]s to doubt the reliability of material transmitted about the past." BROWN, HADITH, *supra*, at 201.

B. The Maturation of Hadith Scholarship

Hadith studies matured slowly. The eighth century saw the first organized works of Islamic scholarship, called mussanafs. They were a mix of hadiths and other materials, organized topically by regionally minded authors. The late eighth and early ninth century saw the emergence of musnad collections, collections composed solely of hadith and organized by isnād. *See* BROWN, HADITH, *supra*, at 18-31.

In the ninth century, the sahih movement emerged. Like the musnad collections, these too were composed solely of hadith. But there was a crucial difference. Until now, collections of hadith had not attempted to exclude inauthentic hadiths. This was the radical innovation of the sahih movement—hadith scholars now acted as editors, making principled decisions about what was reliable (and thus worthy of inclusion) and what was not. *See* BROWN, HADITH, *supra*, at 33 ("With the sahih/sunan movement, the hadith tradition had reached a watershed."). These editorial choices, of course, would shape the future of Islam across the globe. *See* BROWN, MUHAMMAD, *supra*, at 65-66 ("The Muslim historian was thus much more an editor than an author. He expressed his opinions about what had happened in the past not through his prose and written analyses, but through his choices about including and excluding reports.").

That these developments took so long to fully evolve reflects the monumental nature of the tasks involved. Take the experience of Al-Bukhari, an author of the most famous and praised hadith collection of the sahih movement. Al-Bukhari apparently spent 16 years making his collection. *See* BROWN, HADITH, *supra*, at 32. He spent those years sifting through around 600,000 hadith. Many he judged unreliable; others, he discovered, were duplicates. He ended up with only 9,000 hadith in his collection, with around 2,600 unique matn. *See* DENNY, AN INTRODUCTION TO ISLAM, *supra*, at 153.

The vast majority of these hadith, of course, have no bearing on prison administration. Al-Bukhari's collection, for instance, starts with hadith concerning revelation and faith, then turns to issues like prayer and charity, then addresses all manner of human interaction. The collection is a combination of spiritual and temporal guidance, ranging from the most ethereal to the most mundane. *See* DENNY, ISLAM AND THE MUSLIM COMMUNITY, *supra*, at 66 ("Hadith collections contain sections on such topics as God, faith, eschatology, worship warfare, marriage and family life, divorce, inheritance, proper deportment and etiquette, food, clothing, toilette (e.g., cutting the nails, growing a moustache, dressing the hair), bodily functions and hygiene, travel, conversation, trade, funerals, Qur'an recitation [and so on] "); BROWN, MUHAMMAD, *supra*, at 104 (noting that "[h]adiths were also crucial for the elaboration of Islamic theology," as "[m]any theological tenets, such as the nature of heaven and hell, and narratives about the end of the world, come not from the Quran but from Hadith").

These collections, once finished, became an enduring source of religious meaning for Muslims worldwide:

> This process took over two centuries. But when it was completed, the Muslims had a solid second source of authoritative teaching [beside the Quran] to assist them in all aspects of their individual and corporate religious, social, civil, and legal life.

DENNY, AN INTRODUCTION TO ISLAM, *supra*, at 151; BROWN, HADITH, *supra*, at 15 (noting that the culmination of this process gave the Muslim world a set of hadith both to provide "an authoritative maxim used to elaborate Islamic law and dogma" and "a form of connection to the Prophet's charismatic legacy").

III. THE HADITH COLLECTIONS AND THE INSTANT CASE

Of the hadith collections that have been compiled over the centuries, six now stand as the most authoritative within Sunni Islam.[8] All dating from around the close of the 9th century, and together referred to as the Kutub al-Sittah (the Six Books), these collections guide ordinary Muslims in countless ways in their ordinary lives. Of those six, two have particular importance—those of Al-Bukhari and Muslim ibn Al-Hajjaj. Sometimes referred to as

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[8] Shi'a Islam has a hadith tradition as well, but a substantially different one with different hadith and different collections deemed authoritative. *See* BROWN, HADITH, *supra*, at 123-49.

Sahih Bukhari and Sahih Muslim, and collectively referred to as the Sahihayn (the Two Sahihs), these two collections stand out even within the six. *See* BROWN, HADITH, *supra*, at 32 (claiming that these two are seen as "the most famous books of hadith"); DENNY, ISLAM AND THE MUSLIM COMMUNITY, *supra*, at 65-66 (claiming that these two are seen as "stand[ing] out for their high standards").

Petitioner relies on both of these two hadith collections in his brief; in doing so, he fits within long-standing Sunni tradition. *See* Pet. Br. at 5-6. And this reliance is not the work of expert appellate counsel. Both Petitioner's *pro se* complaint, *see* J.A. at 18, and his in-court testimony before the magistrate judge, *see* J.A. at 54, cited Sahih Bukhari—the single most important hadith collection. *See* MUHAMMAD ZUBAYR SIDDIQI, HADITH LITERATURE: ITS ORIGIN, DEVELOPMENT, AND SPECIAL FEATURES 53 (1993) ("The most important of all the hadith collections is of course al-Jami al-Sahih of al-Bukhari [Sahih Bukhari] [It] is generally considered by the Muslims as an authority second only to the Qur'an.").

As Petitioner notes, *see* Pet Br. at 5-6, both Sahih Bukari and Sahih Muslim have hadith calling observant Muslims to wear beards. In fact, each of these collections have multiple hadith on the point—all to the effect that Muslims are to adopt habits of dress and grooming manifestly different than the surrounding cultures. Sahih Al-Bukhari, for instance, has these:

> 780. Narrated by Nafi': Ibn Umar said, The Prophet said, 'Do the opposite of what the pagans do. Keep the beards and cut the

> moustaches short.' Whenever Ibn 'Umar performed the Hajj or 'Umra, he used to hold his beard with his hand and cut whatever remained outside his hold.
>
> 781. Narrated by Ibn 'Umar: Allah's Messenger said, 'Cut the moustaches short and leave the beard (as it is).

7 THE TRANSLATIONS OF THE MEANINGS OF SAHIH AL-BUKHARI 516-17 (Dr. Muhammad Muhsin Khan, 5th ed. 1984).[9]

Sahih Muslim has these hadith:

> 500. Ibn 'Umar said: The Messenger of Allah (may peace be upon him) said: Act against the polytheists, trim closely the moustache and grow beard.
>
> 501. Abu Huraira reported: The Messenger of Allah (may peace be upon him) said: Trim closely the moustache, and grow beard, and thus act against the fire-worshippers.

SAHIH MUSLIM ¶¶ 500-01 (Abdul Hamid Siddiqi trans., 1971).

To be sure, modern-day Muslims take an array of approaches to hadith. While some Muslims

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[9] Petitioner quotes these same hadith, but uses a different edition of Sahih Bukhari. *See* Pet. Br. at 5-6. The content of the hadith are the same in both briefs, but the numbering is different. *Amici* uses a 1984 printing in which the numbering of the hadith start over at the beginning of each volume, while Petitioner uses a 1997 edition in which the hadith are apparently numbered continuously.

feel obligated to follow hadith, others—some Islamic modernists, for example—reject hadith as a source of religious obligation. *See* BROWN, HADITH, *supra*, at 245 (noting that "the 'Quran only' movement flourished in India," although "it flared only briefly in the Arab world"). This kind of diversity is unsurprising; it surfaces in other religious traditions. Jews disagree not only about what is kosher, but about whether the kosher laws should be followed at all. That Reform Jews exist, however, does not impeach the sincerity of the Orthodox (or vice versa). Catholics may believe in transubstantiation; Reform Christians (like Presbyterians) may deny it. This inculpates no one; this is ordinary religious pluralism and nothing more. *See Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 716 (1981) ("[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith.")

What matters is that the Petitioner here is a traditionalist Salafi who believes that God commands him to wear a beard. *See* J.A. at 18, 162. Even if he were the only Muslim that felt this way, it would not matter. *See Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829, 834 (1989) ("[T]he Free Exercise Clause does not demand adherence to a tenet or dogma of an established religious sect.").

But Petitioner is hardly alone. Of the four major schools of Islamic law in Sunni Islam, three (Hanbali, Maliki, Hanafi) require a man to have a beard and the fourth (Shafi'i) at least strongly recommends it: "Shaving one's beard is unlawful according to all Imams except Shafi'i, who wrote two opinions about it, one that it is offensive, and the

other that it is unlawful." AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER: A CLASSIC MANUAL OF ISLAMIC SACRED LAW 58 (Nuh Ha Mim Keller trans., 1991).[10]

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals below should be reversed.

Respectfully submitted,

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[10] Sources in Arabic make the point about the three schools in more detail. *See* MANSUR AL-BUHUTI, AL-RAWD AL-MURBI 25 (1999) (Hanbali); SALIH AL-ABI, AL-THAMAR AL-DANI 500 (1944) (Maliki); 'ALA' AL-DIN AL-KASANI, BADA'I' AL-SANA'I, 2:141 (1982) (Hanafi). Sources in Arabic also speak to how for Salafis, like Petitioner, a beard is absolutely required. *See* MUHAMMAD NASIR AL-DIN AL-ALBANI, ADAB AL-ZIFAF 135-140 (1989); MUHAMMAD ALI AL-SHAWKANI, 1 NAYL AL-AWTAR 192-94 (2001).

AMICUS CURIAE BRIEF

No. 13-6827

In The Supreme Court of the United States

GREGORY HOUSTON HOLT
A/K/A ABDUL MAALIK MUHAMMAD,

Petitioner,

v.

RAY HOBBS, DIRECTOR, ARKANSAS
DEPARTMENT OF CORRECTION, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF THE NATIONAL CONGRESS OF AMERICAN INDIANS AND HUY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Arkansas Department of Correction's grooming policy violates the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc et seq. (2006), to the extent that it prohibits Petitioner from growing a one-half-inch beard in accordance with his religious beliefs.

PARTIES TO THE PROCEEDINGS

Petitioner is Gregory Houston Holt, a/k/a Abdul Maalik Muhammad. Respondents are six employees of the Arkansas Department of Correction:

Director Ray Hobbs

Chief Deputy Director Larry May

Warden Gaylon Lay

Major Vernon Robertson

Captain Donald Tate

Sergeant Michael Richardson

All respondents are sued in their official capacities only.

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The National Congress of American Indians and Huy respectfully submit this *amici curiae* brief in support of Petitioner.[1]

INTERESTS OF *AMICI CURIAE*

Amicus Curiae National Congress of American Indians (NCAI) is the oldest and largest national organization representing the interests of American Indians and Alaska Natives, with a membership of more than 250 American Indian tribes and Alaska Native villages. NCAI was established in 1944 to protect the rights of Indian tribes and to improve the welfare of American Indians, including religious and cultural rights. In courtrooms around the nation and within the halls of Congress, NCAI has vigorously advocated for Native American religious freedom, including passage of the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb et seq. (RFRA) and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc et seq. (RLUIPA).

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[1] Pursuant to Rule 37.3 of the Rules of the Supreme Court, this brief is filed with the blanket consent of both parties to the filing of *amicus curiae* briefs in support of either party or of neither party. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Amicus Curiae Huy is a nationally recognized non-profit organization established to enhance religious, cultural, and other rehabilitative opportunities for imprisoned American Indians, Alaska Natives and Native Hawaiians (collectively hereafter referred to as "Native" or "Native People"). In the traditional Coast Salish language known as Lushootseed, the word huy (pronounced "hoyt"), means: "See you again/we never say goodbye." Huy's directors include, among others, the President of the National Congress of American Indians, elected chairpersons of federally recognized tribal governments, a former Washington State legislator, and the immediate past Secretary of the Washington State Department of Corrections. In addition to funding and supporting Native prisoner religious programs, Huy advocates for Native prisoners' religious rights in federal courts, state administrative rulemakings, and through testimony and reports to the United Nations.

This case presents issues vital to Native cultural survival. As the American Indian Religious Freedom Act acknowledged, "[T]he religious practices of the American Indian are an integral part of their culture, tradition and heritage, such practices forming the basis of Indian identity and value systems." 42 U.S.C. § 1996. As such, religious practice is the cornerstone of Native culture and has held Native communities together for centuries. Walter Echo-Hawk, *Native Worship in American Prisons*, 19.4 CULTURAL SURVIVAL Q. (Winter 1995), *available at* http://www.culturalsurvival.org/ourpublications/csq/article/

native-worship-americanprisons. At the same time, approximately 29,700 American Indian and Alaska Natives are incarcerated in the United States. Todd D. Minton, JAILS IN INDIAN COUNTRY, 2011 (Bureau of Justice Statistics, Office of Justice Programs, U.S. Dep't of Justice) Sept. 2012, *available at* http://bjs.gov/content/pub/pdf/jic11.pdf. Native People in the United States have the highest per capita incarceration rate of any racial or ethnic group, at 38 percent higher than the national rate. Christine Wilson Duclos & Margaret Severson, *American Indian Suicides in Jail: Can Risk Screening be Culturally Sensitive?*, RESEARCH FOR PRACTICE (Nat'l Inst. of Justice, Office of Justice Programs, U.S. Dep't of Justice) June 2005, *available at* https://ncjrs.gov/pdffiles1/nij/207326.pdf; Lawrence A. Greenfeld & Steven K. Smith, AMERICAN INDIANS AND CRIME (Bureau of Justice Statistics, Office of Justice Programs, U.S. Dep't of Justice) Feb. 1999, *available at* http://bjs.gov/content/pub/pdf/aic.pdf. This stands in stark contrast to historical accounts from the 1700s and 1800s detailing Native communities virtually devoid of crime and where prisons were non-existent. *See* Sharon O'Brien, *The Struggle to Protect the Exercise of Native Prisoner's Religious Rights*, 1:2 INDIGENOUS NATIONS STUDIES J. 29, 31 (Fall 2000).

Native inmates are "important human and cultural resources, irreplaceable to their Tribes and families. When they are released, it is important to the cultural survival of [] Native communities that returning offenders be contributing, culturally viable

members." Echo-Hawk, *supra*. For these reasons, Tribal governments share with federal, state and local governments the penological goals of repressing criminal activity and facilitating rehabilitation in order to prevent habitual criminal offense. *See* National Congress of American Indians Res. No. REN-13-005 (June 27, 2013).[2]

Much like the Muslim prisoner in the case *sub judice*, prison grooming policies are a persistent, undue barrier for Native prisoners' religious practice. Like the beard sought by Petitioner here, wearing unshorn hair is an ancient and significant religious practice for Native People. However, by implementing grooming policies that mandate short hair, devoid of religious exemptions, some prison officials force Native inmates to make a Hobson's choice: abandon their sacred religious practice, or undergo either forced haircuts or punishment for non-compliance with grooming policies.

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[2] No other group faces more regulation in the time, place, and manner of religious exercise than Native People. While most Americans are very accustomed to free access to their churches and places of worship, Native People have the opposite experience. For Native People, certain prayers and ceremonies must be held in sacred places, which are often located on Federal lands and Natives must seek permission to access those places for ceremony. Echo-Hawk, *supra*. Moreover, use and possession of sacred objects, such as eagle feathers, peyote and animal parts is often the subject of comprehensive federal and state laws and regulations. *Id.*

One such case is currently pending on a Petition for Writ of Certiorari, *Knight v. Thompson*, 13-955 (Petition for Cert. filed Feb. 6, 2014). There, inmates are prevented from wearing long hair consistent with their Native religion, despite the fact that female inmates may wear long hair and more than 80 percent of prison systems accommodate the religious practice of unshorn hair in a less restrictive manner than an exemptionless ban. *See* Dawinder Sidhu, *Religious Freedom and Inmate Grooming Standards*, 66 U. MIAMI L. REV. 923, 955 (2012); *see also Cutter v. Wilkinson,* 544 U.S. 709, 725 (2005) ("For more than a decade, the Federal Bureau of Prisons has managed the largest correctional system in the Nation under the same heightened scrutiny standard as RLUIPA without compromising prison security, public safety, or the constitutional rights of other prisoners.") (quoting brief for the United States).

Thus, as the Court decides the instant case, addressing how a prison grooming policy must be tailored to meet RLUIPA's strict scrutiny standard, *Amici* NCAI and Huy step forward to provide critical context and information to the Court on the impacts of prison grooming policies on Native prisoners and the preservation of Native religious practice.

SUMMARY OF THE ARGUMENT

Judicial application of strict scrutiny is essential to ensuring the rights of minority religious practitioners in prisons, especially Native prisoners. This standard, codified in RLUIPA, has ensured important protections for prisoners seeking relief in the courts where prison officials impose regulations unduly restricting their religious practices. Much like the Muslim prisoner seeking to wear a beard in this case, grooming policies have been particularly burdensome for Native prisoners because hair is a basic feature of their religious practice, especially long hair. In fact, the centrality of hair to Native religion made it a target of federal policies explicitly aimed at eliminating Native religion and culture altogether. Forced haircuts feature prominently in this unfortunate history and became particularly pronounced in state prisons, where intolerance persisted even after the United States abandoned its official "civilization" policies for Natives.

Prison officials have long repeated the same justifications for restrictive grooming policies: "safety, security and hygiene." These justifications have remained largely the same throughout the decades, only the standard by which they are judged has shifted. In the 1970s, when Native prisoners began challenging these policies, courts applying strict scrutiny recognized them as pretextual and based merely in fear and speculation. As more institutions were forced to accommodate Native religious practice, some began to recognize the benign, non-threatening

nature of long hair and voluntarily relaxed their policies.

However, when the Court handed down *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), which articulated a rational basis standard rather than strict scrutiny for prisoner religious rights claims, many prison systems swiftly began constricting minority religious practices again. Importantly, when the restrictions were challenged, courts applying the extremely deferential rational basis standard were forced to accept the same "safety, security and hygiene" rationalizations that were largely regarded as pretextual prior to *O'Lone*.

As the initial cases applying the *O'Lone* rational basis test were reported, prison officials became increasingly brazen in erecting barriers for minority religious practitioners. Additionally, decisions in *Employment Division v. Smith,* 494 U.S. 872 (1990) and *Lyng v. Nw. Indian Cemetery Protective Ass'n,* 485 U.S. 439 (1988), made clear that the same low bar would be set for government burdens on religious practice outside of prison walls. Thus, after years of hearings, Congress became increasingly concerned about the undue barriers erected by prison officials and provided a statutory means to obtain strict scrutiny review by enacting RFRA and RLUIPA. Since their passage, the vast majority of prisons have tailored grooming policies in order to accommodate practices such as long hair and beards and have done so without interfering with penological interests. Nevertheless, a small number of prison officials, like

Respondents here and in *Knight*, continue to perpetuate penological myths, sounding a false alarm of "safety, security and hygiene," even though those penological interests are achieved when applying non-religious exemptions. Moreover, the concerns claimed by Arkansas and Alabama prison officials have simply not been a reality in the jurisdictions where long hair and beards are allowed. Most concerning, several courts within the Eighth and Eleventh Circuits are misapplying RLUIPA, reducing its strict scrutiny mandate to rational basis, thereby subverting RLUIPA's purpose: providing protection for minority religious practitioners to the maximum extent possible. The detrimental effects of restrictive grooming policies and misapplication of RLUIPA are felt especially in Native communities, who have the highest per capita incarceration rates, have suffered extraordinary religious discrimination and, therefore, depend on the rehabilitative aspects of Native religious practice to return Native prisoners to their communities as productive and culturally viable. In order for the Congressional intent of securing minority religious practice in the prison context to be fully realized, this Court should reverse.

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ARGUMENT

I. JUDICIAL APPLICATION OF STRICT SCRUTINY WAS ESSENTIAL TO ENSURING THE RIGHT OF MINORITY RELIGIOUS PRACTICE IN PRISONS, ESPECIALLY FOR NATIVE PEOPLE, AND *O'LONE* RESULTED IN DRASTIC RESTRICTIONS BY PRISON OFFICIALS.

In 1987, this Court handed down the landmark decision in *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). Just a few days before, in *Turner v. Safley*, 482 U.S. 78 (1987), a case addressing a prisoner's right to marry and engage in prisoner-to-prisoner correspondence, the Court held that lower courts had erred in applying a strict scrutiny test to prison regulations restricting the fundamental rights of prisoners. *Turner*, 482 U.S. at 81. In reviewing a claim by New Jersey Muslim prisoners seeking access to Jumu'ah, a Muslim prayer service held on Friday afternoon, *O'Lone* further made clear that lower courts also erred by applying strict scrutiny when prisons restricted the religious exercise of prisoners with generally applicable regulations. *O'Lone*, 482 U.S. at 344-45. Instead, the *O'Lone* Court held the proper test was the rational basis standard. *O'Lone*, 482 U.S. at 344-45.

The *O'Lone* decision was a watershed moment for minority religious practitioners imprisoned throughout the United States, who had come to rely upon courts to apply strict scrutiny in protection of their religious rights. This was especially true of

Native People, who had fended off an oppressive weight of religious discrimination for centuries and continued to encounter severe restrictions on their religious practices in prison. In the years that followed, application of *O'Lone*, particularly with regard to prison grooming policies, rolled back much of the protections afforded to religious minorities in prison, especially Native People.

A. Restriction of Native prisoners' religious exercise was a vestige of historic discrimination against Native People and Native prisoners had secured substantial judicial relief prior to *O'Lone*.

The *O'Lone* decision dramatically weakened progress made by Native prisoners seeking accommodations of their unique religious practices. The plight of Native prisoners was due to the United States' shameful legacy of religious discrimination against Native People that had become particularly entrenched in state prison systems. In a scholarly review of the ways in which the United States "legally" discriminated against Native religion, Senator Daniel K. Inouye, then-Chairman of the Senate Committee on Indian Affairs, described this discrimination as "commonplace." Senator Daniel K. Inouye, *Discrimination and Native American Religion*, 23 UWLA L. REV. 3, 13 (1992).

Ever since the Republic's founding, forced haircuts and imprisonment have been specific modes of governmental religious discrimination against Native

People. Recognizing the centrality of religious life to Native People, the United States targeted and outlawed specific religious practices in an effort to control individual Natives and eradicate Tribes. John Rhodes, *An American Tradition: The Religious Persecution of Native Americans*, 52 MONT. L. REV. 13, 22-23 (1991). In a calculated effort to extinguish Native culture, the United States historically outlawed traditional practices and ceremonies, punishing practitioners with imprisonment and starvation. *See* Inouye, *supra*, at 3, 13-14.

Hair is an ancient and deeply rooted facet of Native religion. *See Warsoldier v. Woodford*, 418 F.2d 989, 999 (9th Cir. 2005); *Hamilton v. Schriro*, 74 F.3d 1545, 1547 (8th Cir. 1996); *Iron Eyes v. Henry*, 907 F.2d 810, 813 (8th Cir. 1990); *Kemp v. Moore*, 946 F.2d 588 (8th Cir. 1991); *Teterud v. Burns*, 522 F.2d 357, 359-60 (8th Cir. 1975); *see also* Expert Report of Deward Walker, Ph.D. (*Knight v. Thompson*, No. 2:93cv1404-WHA) (M.D. Ala. 2008) (R471-PEX 2) at ¶¶ 4-8 (hereafter "Walker Report"). It has religious significance for all Native groups and uncut hair is of particular religious significance. Walker Report, *supra*, ¶¶ 4-8. Uncut hair symbolizes and embodies the knowledge a person acquires during a lifetime and may be cut only upon the death of a close relative. *Warsoldier*, 418 F.2d at 999; *Teterud*, 522 F.2d at 359-60; O'Brien, *supra*, at 39. Hair is braided to express the integration of mind, body and spirit. O'Brien, *supra*, at 39. Also, it is common for specific hair preparations to be part of Native religious rituals and ceremonies. Walker Report, *supra*. Therefore,

unshorn hair is not only an important practice in and of itself, it is also required to participate in other religious rites, such as the sacred observance of a loved one's death, when the hair is cut ceremonially. Thus, when a Native's hair is cut involuntarily, it prevents him from practicing many facets of his religion. Moreover, forced haircutting desecrates the body and spirit and is the supreme confiscation of personal dignity. *See* O'Brien, *supra*, at 39.

Due to its religious significance, United States officials implementing an explicit "kill the Indian, in order to save the man" federal policy, utilized forced haircutting to coerce Native People away from their traditional religion, even into the Twentieth Century. Walker Report, *supra*, at ¶ 5; *see also* Jill E. Martin, *Constitutional Rights and Indian Rites: An Uneasy Balance*, 3:2 WESTERN LEGAL HISTORY 245, 248 (Summer/Fall 1990); *Let All That is Indian Within You Die!*, 38(2) Native Am. Rts. Fund Legal Rev. (Summer/Fall 2013), at 5-7.[3] This ethnocentric

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[3] These overtly discriminatory policies ended in the mid-Twentieth Century, but infringement on Native religious liberty persisted, necessitating a succession of laws in the latter Twentieth Century crafted to protect Native religion and culture. Among these was the American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996 (1993 amendments at 42 U.S.C. § 1996a), which explicitly recognized that First Amendment religious liberty protection had never worked for Native People, thus requiring a specific federal law preserving their religious rights. Other laws crafted to remedy this shameful legacy include, the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001 et seq., the Indian Arts and

(Continued on following page)

approach of "helping" Natives manifested in prisons as well, where rehabilitation of Native prisoners meant stripping them of cultural identity and religion in favor of mainstream Christian religion and assimilation into the majority society. Echo-Hawk, *supra*.

Maltreatment of Native prisoners' religious practice only began to shift in the early 1970's as the result of voluminous litigation. Echo-Hawk, *supra; see, e.g., Teterud v. Burns*, 522 F.2d 357 (8th Cir. 1975) (holding Native prisoner has a first amendment right to exercise his religion by wearing his hair long); *Gallahan v. Hollyfield*, 516 F. Supp. 1004 (E.D. Va. 1981) (same), *aff'd*, 670 F.2d 1345 (4th Cir. 1982). The genesis of that litigation was the wearing of traditional hairstyles in Nebraska prisons. In 1972, Nebraska prisons, like many others at the time, provided no accommodation for Native religious practices. When a deputy warden was offended by Native prisoners cutting their hair into traditional Mohawk styles, the Native prisoners were threatened with solitary confinement unless they cut their hair. Elizabeth S. Grobsmith, INDIANS IN PRISON: INCARCERATED NATIVE AMERICANS IN NEBRASKA 38 (1994). The inmates filed a class action lawsuit, *Indian Inmates of the Nebraska Penitentiary v. Vitek*, CV 72-L-156 (D. Neb. filed April 12, 1972), and the resulting consent

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Crafts Act of 1990, 25 U.S.C. §§ 3005 et seq., the National Historic Preservation Act, 16 U.S.C. §§ 470 et seq., and the Archeological Resource Protection Act, 16 U.S.C. §§ 470aa et seq., RFRA and RLUIPA.

decree, issued in 1974, became a touchstone for how prison officials elsewhere could accommodate the religious needs of Native inmates. Judgment and Decree, *Indian Inmates of the Nebraska Penitentiary v. Vitek*, CV 72-L-156 (D. Neb.) (docketed October 31, 1974), reprinted in Grobsmith, *supra*, at Appx. A.

Over the decade-and-a-half following the *Vitek* case, courts substantially increased protections for traditional Native religious practices in prison. Another case, filed the year after the *Vitek* consent decree, illustrates the typical arguments of prison officials restricting unshorn hair and how courts disposed of the cases. Jerry Teterud, who was Cree, challenged Iowa's prison regulations requiring short hair. *Teterud v. Burns*, 522 F.2d 357, 358-59 (8th Cir. 1975); *see also* O'Brien, *supra*, at 39 (analyzing *Teterud* within the context of Native prisoner First Amendment cases). Iowa claimed that short hair was necessary for sanitary food preparation, safe operation of machinery, easy identification, prevention of contraband smuggling and personal hygiene. *Teterud*, 522 F.2d at 361. The Eighth Circuit found that the prison officials' claims were devoid of substance and overly broad. *Id.* The court pointed out that there were a variety of less restrictive means to achieve these interests: hair nets, rules requiring hair to be kept neat and clean, re-photographing inmates for identification and body searches. The court pointedly concluded, "Justifications founded only on fear and apprehension are insufficient." *Id.* at 361-62.

Moreover, as both the benefits and benign nature of Native religious practices became better understood, several jurisdictions provided improved accommodations voluntarily. *See* Echo-Hawk, *supra*. Even the warden-defendant in the landmark Nebraska case began testifying in support of Native prisoners seeking religious accommodations. His statements in a 1985 Utah case, *Roybal v. Deland*, Nos. C-87-0208A & C-87-8208G (D. Utah 1989), about his experience in Nebraska after the consent decree bears particular significance in light of present prison claims regarding grooming policies:

> [W]hat I did see specifically [was] that a lot of Indians, not all of them, developed a great deal of self-esteem and pride in themselves. *There was an apparent increase in what I call good grooming*, the clothing, there seemed to be a prideful thing that was kind of fun to watch. Sense of identity if you will.

Motion for Leave to File Brief *Amicus Curiae*, *Roybal v. Deland*, Nos. C-87-0208A & C-87-8208G (D. Utah 1989) (filed Jan. 31, 1989).

Given all the progress made in securing respect and accommodation for their traditional religious practices, Native prisoners and their supporters were put on their heels by *O'Lone*. Unfortunately, as the next six years would demonstrate, their fears were well justified.

B. *O'Lone* resulted in prison officials resuming past restrictions on the religious practices of Native prisoners.

Emboldened by *O'Lone*, prison officials began reinstating previous restrictions on Native religious practices with impunity. Native prisoners attempting to wear long hair or engage in other traditional practices, such as sweat lodge, were routinely subjected to egregious and unnecessary treatment by their jailors and afforded no judicial protection. The detrimental application of rational basis was particularly pronounced in the Eighth Circuit, as vividly demonstrated in two cases from the post-*O'Lone* period, *Iron Eyes v. Henry*, 907 F.2d 810 (8th Cir. 1990) and *Kemp v. Moore*, 946 F.2d 588 (8th Cir. 1991).

Robert Iron Eyes, a Standing Rock Sioux, had only five haircuts in his twenty-seven years: three in mourning for the death of a loved-one and two at the hands of his jailors. *Iron Eyes*, 907 F.2d at 811. He was raised in the ways of the Sioux culture and had followed the traditional practices of Sioux religion since his youth. *Id.* As such, he believed that his hair was a gift from the Great Spirit, and that cutting it was an offense to the Creator, except when done so in mourning. *Id.*

When he entered Missouri's Farmington Correctional Facility on a parole violation in October 1987, prison officials ordered him to get a haircut, although he was never ordered to do so during a previous one-year term. *Id.* at 812. When Iron Eyes refused, he

was sent to disciplinary segregation, where he was shackled, handcuffed and subjected to a forced haircut. *Id.* at 812, 816. Iron Eyes described the experience:

> Just before Christmas Maj. Harris, Capt. Rosenburg and about 9 or 10 other guards handcuffed me behind my back real hard and put leg shackles on me and made me go in a room with all of them. Then they shoved a table in front of the door so nobody could get out. Then, Dan Henry, the Asst. Supt. said that I am going to get a haircut one way or the other and that they didn't care if I was Geronimo. I told them that the courts also said us Indians could keep our hair and Dan Henry said for me and the court to go and fuck ourselves [sic]. I am sorry about that word but that is what he really said.
>
> Well, Dan Henry, Maj. Harris, Capt. Rosenburg and the guards all took my leg shackles and handcuffs real hard and held me down and this inmate barber named Earl Wells came over and cut my hair into a raggedy mess. That is when they all started laughing and Maj. Harris said that now I could get some white religion.

Iron Eyes, 907 F.2d at 817.

As pointed out in the dissent, at least one prison barber referred to the forced haircuts of Native inmates as "scalping." *Id.* at n.14. Ten months later, he was ordered to get another haircut and this time obtained a restraining order from the Federal District

Court. It also came to light that Mr. Iron Eyes' request for a religious exemption was never communicated by prison officials to the proper authorities. *Iron Eyes*, 907 F.2d at 817.

In an effort to skirt the court's restraining order, while awaiting a hearing on the merits the prison placed Iron Eyes in solitary confinement, "not for not cutting his hair, but for disobeying a direct order to cut his hair." *Id.* at 817.

The court's decision was not determined by any of these facts, however. Instead, and in contrast to *Teterud*, the court narrowly focused on whether the prison officials' justifications could conceivably further their penological interests. Notably, applying rational basis, the court did not engage in an individualized, searching inquiry into the facts of Mr. Iron Eyes' case. For example, while prison officials objected to long hair because inmates could purportedly change their appearance, the court found it "incredulous" that prison officials did not simply rephotograph him during one of the periods that his hair was short, but nevertheless, applying rational basis, found their concerns *"rationally related"* to security interests. *Id.* at 814. Thus, the court was constrained to accept the assertions of prison officials simply at face value, which the dissenting judge found alarming. *Id.* at 823.

Therefore, although decided by the same court as *Teterud* and addressing the same types of oppressive conduct, backed by unsubstantiated rationalization,

the *Iron Eyes* case was distinguishable because the court had to apply *O'Lone*'s lower standard. *Iron Eyes*, 907 F.2d at 813. Thus, *Iron Eyes* signaled that highly deferential review would permit extraordinary conduct by prison officials. The case notified prison officials that they could impose severe restrictions, enforce them in a brutal manner and proceed virtually unchecked by simply waving the flag of "safety and security."

Iron Eyes was not an isolated case. Prison officials that took the court's cue became bolder, as can be seen in a case that followed. Stephen Kemp, who was Chickasaw, was incarcerated in the Missouri State Penitentiary, a maximum security prison, for the first four years of his imprisonment, where he was allowed to wear long hair consistent with his traditional religion. *Kemp*, 946 F.2d at 589. After four years, his security level was *reduced* and he was transferred to a minimum security prison, Farmington Correctional Center – the same facility as Henry Iron Eyes – where he was ordered to get a haircut. *See id.* He refused and presented verification of his exemption. *Id.* Nevertheless, the superintendent ordered guards to forcibly shear his hair and disciplinary charges resulted in reduction of his work wages. *Kemp*, 946 F.2d at 589; *see also* Laurence French, NATIVE AMERICAN JUSTICE 123-24 (2003). The resulting opinion was a terse, unequivocal reiteration of the *Iron Eyes* precedent as informed by the *O'Lone* standard.

Senior Judge Gerald W. Heaney, who dissented in *Iron Eyes*, wrote that he was constrained by precedent to concur, but that: "This case smacks of harassment and religious persecution. " *Kemp*, 946 F.2d at 589 (Heaney, S.J., concurring). The judge was confounded by the lack of explanation by prison officials as to why long hair purportedly interfered with penological interests at a lower security facility and not at a maximum security prison. *Kemp*, 946 F.2d at 589. Although there were obvious less restrictive means that could be employed, these were outside the bounds of rational basis inquiry. Tragically, the low bar set by *O'Lone* and amplified in *Iron Eyes* meant the courts gave Mr. Kemp no protection and he was forced to abandon a core tenet of his traditional religion.

O'Lone's impacts continued further in this prison system. In the wake of *Iron Eyes* and *Kemp*, Missouri prisons did away with religious exemptions for long hair altogether. *See Holmes v. Schneider*, 978 F.2d 1263 (8th Cir. 1992). Thus, the increased restrictions brought about by *O'Lone* came full circle into an all-out ban. Any relief would have to come from Congress.

II. CONGRESS ENACTED RLUIPA TO BROADLY PROTECT THE RELIGIOUS PRACTICES OF PRISONERS TO THE "MAXIMUM EXTENT" POSSIBLE.

In *Employment Division v. Smith*, 494 U.S. 872 (1990), this Court held that a state law prohibiting

the use of peyote, as applied to the religious use of peyote by members of the Native American Church, did not violate the Free Exercise Clause. The Court determined that a valid, neutral, and generally applicable law is not invalidated under the Free Exercise Clause merely because it burdens religious practice. *Id.* at 890. As it had in *Lyng v. Nw. Indian Cemetery Protective Ass'n,* 485 U.S. 439 (1988) (upholding U.S. Forest Service building roads through and permitting timber harvesting within an area traditionally used for Native American religious ceremonies), the Court declined to apply the strict scrutiny test from *Sherbert v. Verner,* 374 U.S. 398 (1963), whereby governmental actions that substantially burden a religious practice must be justified by a "compelling governmental interest" that cannot be furthered by any less restrictive means.

The results in *Smith* and *Lyng* made it clear that, even for those not imprisoned, certain government burdens on religious exercise would be subject to rational basis review – the lowest level of judicial scrutiny, which Justice Stevens later lamented amounts to no review by the Court whatsoever. *See FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 323 (1993) (Stevens, J., concurring). *Smith* in particular provided the catalyst for Congress to enact RFRA, and in turn RLUIPA, which codify the strict scrutiny test. Specifically, section 3 of RLUIPA prohibits state and local governments from imposing "a substantial burden on the religious exercise of a person residing in or confined to an institution unless the

government demonstrates that imposition of the burden on that person": (1) "is in furtherance of a compelling governmental interest" and (2) "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a).

A. Despite Congress' clear mandate, the Arkansas Department of Correction and the Alabama Department of Corrections persist in maintaining overly-restrictive grooming policies in violation of RLUIPA.

Currently, the overwhelming majority of prison systems in the United States now have permissive grooming policies, or exemptions which accommodate the needs of various minority religious practitioners – some at their own initiative, others at the behest of the courts. *See* Sidhu, *supra*, at 948, 955. Regardless of the impetus of these policy changes, accommodation by prison officials for facial hair, or the wearing of long hair, for religious reasons has proven to be benign, despite dire warnings from a handful of penal institutions. *Id.* at 961. This small number of intransigent prison systems cling to punitive treatment for violation of their restrictive grooming policies based on "speculation, exaggerated fears, [and] post-hoc rationalization," which RLUIPA was crafted to remedy. *See* Joint Statement of Senator Orrin Hatch and Senator Edward Kennedy on Religious Land Use and Institutionalized Persons Act, 146 Cong. Rec. 16698, 16699 (2000).

As can be seen in cases reaching back to *Iron Eyes* and *Kemp*, and continuing through to the present with *Holt* and *Knight* pending on review before this Court, the common refrain from prison officials in defense of their refusal to provide religious exemptions to restrictive grooming policies has been: Safety; Security; and Hygiene. However, on closer inspection, this common refrain rings hollow in measuring up to RLUIPA's rigorous standard.

1. Prison officials rely on speculative fears to substantiate their compelling interest claims, which are not borne out by the experiences of well-run, more accommodating institutions. In *Holt,* the Arkansas Department of Correction officials claimed compelling interests in safety and security, fearful that Petitioner could secret contraband in his beard but could not give a single example, from Arkansas prisons or anywhere else, where beards had interfered with those interests. *See* Brief for the Petitioner at 28-31, 32. They admittedly had no knowledge of the policies and experiences of other well-run prisons. *Id.* Similarly, they could not give any examples where their other concerns – such as shaving a beard to change appearance or exemptions fomenting the resentment of other inmates – that had actually occurred anywhere. *Id.* at 8-9.

Likewise, in *Knight*, the Alabama Department of Corrections' (ADOC) asserted a compelling penological interest in safety, claiming that prisoners could secret contraband in their long hair. However, out of the thousands of inmates housed in prisons

with more permissive grooming policies, ADOC could only point to purported incidents from an out-of-control, admittedly chaotic Virginia prison system to support its claim. *See Knight v. Thompson*, 723 F.3d 1275, 1279 (11th Cir. 2013). Similarly, ADOC's only support of its interest in hygiene was an unverified story of a prisoner with dreadlocks who had a spider nest in his hair and worries that long hair could conceal scalp sores or tumors – an issue that would presumably be posed in its women's prisons, which allow long hair. *Id.* All of the evidence specific to Alabama on the compelling interest element articulated fears of what might happen based on speculation. Not a single concrete example was offered that actually occurred in the State of Alabama, let alone with reference to the Native prisoners seeking relief. Surely, the claims of these prison officials are the type of "frivolous or arbitrary" barrier, grounded in speculation and exaggerated fears, to which Congress referred when passing RLUIPA and demanding tougher scrutiny by the courts. *See* Joint Statement, *supra*.

2. Prison officials fail to conduct the required individualized inquiry. Proper strict scrutiny analysis is applied with regard to the specific person seeking a religious exemption. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006) (applying RFRA's strict scrutiny application); *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (explaining RLUIPA's strict scrutiny standard is carried over from RFRA). Non-specific, speculative

assertions by prison officials fail that test. Nevertheless, defenses advanced by prison officials never demonstrated how employing a less restrictive alternative for *the specific inmate-plaintiffs* was infeasible. Without that particularized explanation, a court is left with only "speculation, exaggerated fears, [and] post-hoc rationalizations," which neither prison officials nor reviewing courts may rely upon.

Here, prison officials explained their belief as to why a religious beard exception was unworkable generally in Arkansas, but did not offer any explanation with reference to Mr. Holt specifically. Also, the Magistrate made no conclusions or findings as to why *Mr. Holt* could not be afforded a religious exemption for his beard. *See* Brief for the Petitioner at 54-55. RLUIPA demands case-by-case consideration of religious exemptions. *O Centro*, 546 U.S. at 436. Therefore, a fundamental aspect of the required burden and analysis was not even addressed.

In *Knight*, ADOC claimed that allowing long hair in female prisons but not male prisons was allowable because male inmates are generally more violent. ADOC never attempted to demonstrate how employing a less restrictive alternative for *the specific inmate-plaintiffs* was infeasible. All of the evidence presented discussed generalities in Alabama prisons and any analysis specific to the Native prisoners bringing the claim was conspicuously absent from the Eleventh Circuit's opinion.

3. Prison officials failed to examine and consider less restrictive measures successfully implemented in other prison systems. *See Warsoldier v. Woodford*, 418 F.2d 989, 999 (9th Cir. 2005) (citing *U.S. v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 824 (2000) (finding, in context of First Amendment challenge to speech restrictions, that "[a] court should not assume a plausible, less restrictive alternative would be ineffective"); *Spratt v. Rhode Island Dep't of Corrections*, 482 F.3d 33, 41 (1st Cir. 2007); *Washington v. Klem*, 497 F.3d 272, 284 (3d Cir. 2007); *contrast Knight*, 723 F.3d at 1285-86 (holding that the heightened level of proof adopted in other circuits is not the law of the Eleventh Circuit).

In both *Holt* and *Knight*, the lower courts simply accepted the unsubstantiated assertions of prison officials that those measures and alternatives were unworkable. The prison officials in *Holt* could not explain what made Arkansas so different from the 44 prison systems that would allow Mr. Holt's beard. Similarly in *Knight*, when it came to evaluating whether prison officials employed the least restrictive means, the court failed to require them to explain why the less restrictive grooming policies safely implemented in at least 38 states, the District of Columbia and the Federal Bureau of Prisons meeting the same penological interests, could not be implemented. *Knight*, 723 F.3d at 1285-86. Thus, these courts departed from settled strict scrutiny jurisprudence. In so doing, the Eleventh Circuit put its imprimatur on the Alabama Department of Corrections'

complete prohibition of a core Native religious practice where it admittedly did not even consider a less restrictive alternative, let alone *demonstrate* its ineffectiveness, just as the Eighth Circuit did in *Holt* with regard to Muslim prisoners. *See Yellowbear v. Lampert*, 741 F.3d 48, 63 (10th Cir. 2014) ("[T]he government's burden here isn't to mull the claimant's proposed alternatives, it is to demonstrate the claimant's alternatives are ineffective to achieve the government's stated goals.").

4. The same prisons that refuse religious exemptions often have other exemptions to their grooming policies that do not interfere with penological interests. In the instant case, Arkansas provides medical exemptions for beards but no religious exemption. Just as confounding, in *Knight* ADOC permits long hair for female inmates, undermining their justification for refusing a long hair religious exemption for Native male inmates. Trial Tr. vol. II, Jan. 22, 2009 (*Knight v. Thompson*, No. 2:93cv1404-WHA) (M.D. Ala. 2008) at 5; *see also Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 367 (3d Cir. 1999) (Alito, J.) ("We are at a loss to understand why religious exemptions threaten important [government] interests but medical exemptions do not."). It is difficult to square these prison officials' apparent ability to further state interests in preventing the secreting of contraband, identification upon escape and inmate hygiene through policies allowing long hair for women and medical exemptions for beards, with its asserted inability to further the same interests with a religious exemption. Indeed,

this contradiction suggests that these restrictive grooming policies do not further those penological interests and that the prison officials are not utilizing the least restrictive means. When the incongruence of these justifications is recognized, there is no doubt that prison officials are merely perpetuating penological myths. *See Kemp*, 946 F.2d at 589 (Heany, S.J., concurring) ("The sooner our court en banc considers this question and resolves to do away with the penological myth that the director of this institution perpetuates, the better.").

When a lower court defers to such flimsy justifications, it effectively converts Congress' strict scrutiny standard under RLUIPA into a rational basis standard. These courts do so under the guise of "due deference," while ignoring the admonition in the same Senate report that "[p]olicies grounded on mere speculation, exaggerated fears, or post-hoc rationalization will not suffice to meet the act's requirements." S. Rep. No. 103-111 (1993) at 10. While Congress anticipated "due deference," it is folly to defer to a judgment that is unsubstantiated and admittedly uninformed. That amounts to no review whatsoever and abdicates the judicial obligation under RLUIPA to apply strict scrutiny. When acting without the particularized evidence tied to the plaintiff that RLUIPA demands, courts *de facto* apply a rational basis standard, which RFRA and RLUIPA were expressly enacted to supplant. *See Cutter*, 544 U.S. at 714-18. This turns back the clock to a time when prison officials could run roughshod over the religious rights of all prisoners.

B. It is critical for Native People that courts interpret and apply RLUIPA as Congress intended.

Stories of the kind of routine, deplorable treatment suffered by Native prisoners at the hands of state prison officials described above in *Iron Eyes* and *Kemp* were documented within the legislative history of RFRA and RLUIPA. As this Court observed in *Cutter v. Wilkinson*, 544 U.S. 709, 716-17 (2005):

> Before enacting § 3 [of RLUIPA], Congress documented, in hearings spanning three years, that "frivolous or arbitrary" barriers impeded institutionalized persons' religious exercise. See 146 Cong. Rec. 16698, 16699 (2000) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA) (hereinafter Joint Statement) ("Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways."). To secure redress for inmates who encountered undue barriers to their religious observances, Congress carried over from RFRA the "compelling governmental interest"/"least restrictive means" standard. See id., at 16698.

As the case examples demonstrated to Congress, in the absence of strong laws protecting free exercise of religion, government institutions – in particular prisons – will unduly restrict Native religious practices, often brutally. Thus, in passing RFRA and RLUIPA Congress sought "to restore traditional protection afforded to prisoners' claims prior to

O'Lone." S. Rep. No. 103-111 at 10. Congress further recognized that *O'Lone* disturbed a standard that "had proved workable" and was "employed without undue hardship to [ ] prisons. " S. Rep. No. 103-111 at 11. Accordingly, it is critical for Native People that courts interpret and apply RLUIPA as Congress intended: to "broad[ly]"protect Native religious practices to the "maximum extent" possible. *See* 42 U.S.C. §2000cc-3(g); Michael J. Simpson, *Accommodating Indian Religions: The Proposed 1993 Amendment to the American Indian Religious Freedom Act*, 54 MONT. L. REV. 19 (Winter 1993); Inouye, *supra*, at 3; Martin, *supra,* at 245 (1990).

Far from threatening safety and security, religious practice, including traditional Native religious practice, reduces recidivism, positively affects discipline, reduces violence, and aids rehabilitation. *See, e.g.*, Melvina T. Sumter, Religiousness and Post-Release Community Adjustment: Graduate Research Fellowship – Final Report (Aug. 3, 1999) (unpublished Ph.D. dissertation, Florida State University) (on file with National Criminal Justice Reference Service – U.S. Dep't of Justice); Byron R. Johnson et al., *Religious Programs, Institutional Adjustment, and Recidivism Among Former Inmates in Prison Fellowship Programs*, 14 JUST. Q. 145 (1997). This should be weighed against the fact that Respondents could not give a single concrete example of beards being a security or safety issue in Arkansas, nor do the Respondents in *Knight* in relation to long hair.

Prison officials that have actually thoroughly evaluated options and provided accommodations for

Native religious practice do not report interference with penological interests. To the contrary, California corrections officials have acknowledged that appropriate accommodation reduced violence and afforded inmates a sense of pride and brotherhood and that this cooperative attitude carried over into their social reintegration upon release. Grobsmith, *supra,* at 164. Idaho prison officials have reported that Native practices in prison enables inmates to come together in mutual self-help, stating: "It is definitely rehabilitative for those individuals that have no direction in life or no concern or understanding for self or others." *Id.* Oklahoma officials stated that Native People's practices have a positive effect on discipline. *Id.* Yet, these rehabilitative benefits are foreclosed by overly-restrictive grooming policies, further undermining any claim that they actually further the asserted compelling interests.

In his *O'Lone* dissent, Justice Brennan wrote, "To deny the opportunity to affirm membership in a spiritual community may extinguish an inmate's last source of hope for dignity and redemption." *O'Lone*, 482 U.S. at 368. For Native People, hair is an integral facet of religious practice, both in itself and as an aspect of an array of ceremonies. In erecting undue barriers to Native prisoners' religious practice through restrictive grooming policies, many prisons have foreclosed Native inmates' opportunity for worship and its rehabilitative benefits. It is vital that Native communities receive these offenders as rehabilitated, culturally viable members.

CONCLUSION

For the foregoing reasons, the judgment should be reversed and the case remanded for further proceedings consistent with an opinion clearly stating that RLUIPA shall be enforced according to its terms and that Respondents have wholly failed to prove either compelling interest or least restrictive means.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-6827

In The
Supreme Court of the United States

GREGORY HOUSTON HOLT a/k/a
ABDUL MAALIK MUHAMMAD,

Petitioner,

v.

RAY HOBBS, DIRECTOR, ARKANSAS
DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit**

BRIEF *AMICUS CURIAE* OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA"), ET AL., IN SUPPORT OF PETITIONER

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Rabbinical Council of America

National Council of Young Israel

Union of Orthodox Jewish Congregations of America

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BRIEF *AMICUS CURIAE* OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA"), ET AL., IN SUPPORT OF PETITIONER

INTEREST OF THE AMICI[1]

[1] Pursuant to Supreme Court Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part. No person or party other than the *amici* has made a monetary contribution to this brief's preparation or submission. All parties have consented in writing to the filing of this *amicus* brief.

Petitioner brought this lawsuit because the Arkansas prison authorities have a "no beard grooming policy" that compels him to violate "his beliefs that all Muslim males are not to shave their beards." Although he understood his religious obligation was to leave his beard entirely uncut, he requested permission, as a "compromise," to grow a beard to a length of one-half inch. The district court granted that requested relief, and this case, in its present posture, concerns the right under the Religious Land Use and Institutionalized Persons Act ("RLUIPA") to wear a one-half-inch beard in a state prison.

These *amici* represent the Orthodox Jewish community and submit this brief on behalf of adherents to the Jewish faith who are religiously observant. Male facial hair is a subject of Jewish ritual law derived from the Biblical commandment in *Vayikra* (Leviticus) 19:27: "You shall not round off the edge of your scalp and you shall not destroy the edge of your beard." As described summarily in this brief, this directive prohibits shaving facial hair with a razor and, in the view of a significant component of the Orthodox Jewish community, requires men never to trim their facial hair or, at least, to wear a beard.

Jewish plaintiffs have initiated and prevailed in lawsuits in lower courts that sought exceptions for religious facial hair from no-beard rules announced by federal and local government agencies. We are filing this *amicus* brief to alert the Court to concerns of the Orthodox Jewish community regarding

governmental grooming restrictions and limitations on the growth of male facial hair.

We ask that the Court's decision in this case not imply that a prison regulation may prohibit beards longer than one-half inch. The Court's decision should follow the rule in the 41 jurisdictions that impose no limitation whatever on male facial hair in prison and permit beards to be grown in prison to any length. Such an interpretation of RLUIPA would foreclose any future attempt to deny to Jewish inmates or to others observing faith-based rules the right to follow their faith's command with regard to facial hair.

The National Jewish Commission on Law and Public Affairs ("COLPA") is an organization of volunteer lawyers that advocates the position of the Orthodox Jewish community on legal issues affecting religious rights and liberties in the United States. COLPA has filed *amicus* briefs in this Court in 29 cases since 1968, usually on behalf of major Orthodox Jewish organizations. It has also supported laws protecting the right of observant Jews -- and that of their non-Jewish co-religionists -- to the reasonable accommodation of their religious observances when they conflict with governmental regulation or with societal practices.

Agudas Harabbanim of the United States and Canada is the oldest Jewish Orthodox rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Jewish community.

Agudath Israel of America ("Agudath Israel"), founded in 1922, is a national grassroots Orthodox Jewish organization. Agudath Israel articulates and advances the position of the Orthodox Jewish community on a broad range of legal issues affecting religious rights and liberties in the United States. Agudath Israel intervenes at all levels of government -- federal, state, and local; legislative, administrative, and judicial -- to advocate and protect the interests of the Orthodox Jewish community in the United States in particular, and religious liberty in general. Agudath Israel played a very active role in lobbying for the passage of the Religious Freedom Restoration Act ("RFRA") and the Religious Land Use and Institutionalized Persons Act ("RLUIPA").

Aleph Institute ("Aleph") is a national, not-for-profit 501(c)(3), publicly-supported charitable institution founded in 1982 by Rabbi Sholom D. Lipskar under the direction of the Lubavitcher Rebbe, Rabbi Menachem M. Schneerson. For over thirty years, Aleph has been serving society by: (1) providing critical social services to families in crisis; (2) addressing the pressing religious, educational, humanitarian and advocacy needs of individuals in the military and institutional environments; and (3) implementing solutions to significant issues relating to our criminal justice system, with an emphasis on families, faith-based rehabilitation and preventive ethics education.

National Council of Young Israel ("NCYI") is the umbrella organization for over 200 Young Israel branch synagogues with over 25,000 families within

its membership. It is one of the premier organizations representing the Orthodox Jewish community, its challenges and needs, and is involved in issues that face the greater Jewish community in North America and Israel.

Rabbinical Alliance of America is an Orthodox Jewish rabbinical organization with more than 400 members that has, for many years, been involved in a variety of religious, social and educational causes affecting Orthodox Jews.

Rabbinical Council of America ("RCA") is the largest Orthodox rabbinical organization in the world with a membership that exceeds 1,000 rabbis. RCA is deeply involved in issues related to religious freedom.

The Union of Orthodox Jewish Congregations of America ("Orthodox Union") is the nation's largest Orthodox Jewish umbrella organization, representing nearly 1,000 congregations coast to coast. The Orthodox Union has participated in many cases before this Court which have raised issues of importance to the Orthodox Jewish community. Among those issues, of paramount importance is the constitutional guarantee of religious freedom. Because of our community's stake in the most expansive protection of this "first freedom," the Orthodox Union was an active member of the coalition that advocated for the enactment of RFRA.

STATEMENT

Negative Commandment No. 44 in Maimonides' historic treatise *Sefer Ha-Mitzvoth* ("The Book of Commandments"), written in the Twelfth Century, cites Leviticus 19:27 as the source for the rule that a male Jew may not shave any of five corners of his beard. (See Appendix I to this Brief.) A second verse in *Vayikra* (Leviticus) 21:5 directs priests "not [to] shave the edge of their beard." For many observant Jews, the Biblical prohibition does not prevent use of scissors or electric shavers but applies only to "the marring of the beard with a razor." Appendix I, note.

There are, however, significant segments of the world-wide Orthodox Jewish community that treat these Biblical verses as extending beyond prohibiting use of a razor to remove male facial hair. In a comprehensive discussion of the Jewish Law observances regarding male facial hair, Rabbi Eliyahu Touger concluded that "there is substantial basis to prohibit removing the beard by any means; this is the opinion of some of the greatest *halachic* luminaries over the course of Jewish history." Eliyahu Touger, *The Beard in Jewish Law: Halachic Imperative or Kabbalistic Stringency*" (Ktav 2010), p. vi.[2]

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[2] Rabbi Touger also found: "Jewish tradition venerates growing a beard and ascribes an awesome degree of holiness to its hairs. A beard is traditionally referred to as 'the image of G-d' and, as above, is considered a sign of Jewish identity. Throughout the ages, Jews have always related to their beards with reverence, as a sacred object. Indeed, there is a broadly followed custom of burying hairs that have fallen from the beard in a cemetery

The *Encyclopedia Judaica* notes that "with the spread of kabbalism in Eastern Europe, trimming the beard was gradually prohibited by leading rabbinic authorities and with the rise of Hasidism, the removal of the beard became tantamount to a formal break with Jewish tradition." 3 *Encyclopedia Judaica* 236 (2d ed. 2007) (Appendix II to this Brief) (citation omitted).

A famous opinion of the head of the rabbinic court of Munkacz, Rabbi Chayim Elazar Spira (1871-1937), known as the *Minchas Elazar*, declared in a widely publicized responsum that any trimming of the beard of a Jewish male is forbidden "according to the letter of the law." (A full translation of this opinion appears at pages 3-33 of Touger, *op. cit. supra*.) The opinion of Rabbi Jonathan Eyebschuetz (1690-1764), author of 30 published works of Jewish Law and chief rabbi of several leading Jewish communities in Germany, was that "one who removes his beard forfeits the image of G-d." *Ya'aros Dvash, Drush 15.* More modern rabbinic authorities such as Rabbi Yisrael Meir Kagan (the *Chofetz Chaim*) (1839-1933) and Rabbi Avraham Yeshayahu Karelitz (the *Chazon Ish*) (1878-1953) prohibited the

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and in certain communities, it was customary to grasp one's beard when taking an oath in court, thus affording the beard status similar to that of a Torah scroll or *Tefillin*."

"License to remove the beard with scissors or depilatory cream was originally granted only because of persecution and because of a threat to life. Indeed, over the course of our national history, sages and common people alike have risked and sacrificed their lives rather than remove their beards."

use of shaving machines and strongly encouraged untrimmed beards. Touger, *op. cit. supra* 39, 40, 43-51.

A beard was considered a Jewish insignia through centuries of Jewish history in the Diaspora.[3] Wherever they seized control of Jewish populations in the 1930's, Nazi rulers displayed their hatred of, and contempt for, Jews by having the SS publicly cut or tear the beards of Jewish men. See, *e.g.*, *The Holocaust Chronicle* (Legacy 2009), pp. 150, 173, 330, 376 and photographs.[4]

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[3] An eighteenth-century author included the following in his description of the appearance of a Jew: "The German Jews wear their Beards from the Extremity of one Jaw to the other, like a Cord, which is divided by a Tuft into two equal Parts, which falls very agreeably from the Chin upon the Breast." A nineteenth-century observer of Jewish life in Poland said in his description: "[T]he beard is unkempt and reaches to the chest." Rubens, *A History of Jewish Costume* (Valentine, Mitchell 1967), pp. 154, 132.

[4] Photographs on the cited pages bear the following captions:

"A Jew in Poland is publicly humiliated by the forcible trimming of his beard, a symbol of his faith."

"One of the favorite forms of 'entertainment' for the German invaders of Poland was to shear the beards of Orthodox Jews. This photograph shows SS troops from the *Leibstandarte* (bodyguard regiment) 'Adolf Hitler' forcibly shaving an Orthodox Jew in Lublin, Poland. Not only was this humiliating for the victim, but it also violated the religious scruples of many Eastern European Jews."

"The Nazis often insisted upon adding insult to injury by tormenting Jews who were about to be deported to their deaths. Here, Nazi thugs humiliate an Orthodox Jew from the

A Hasidic community that scrupulously follows the rule prohibiting any trimming whatever of the beard is Chabad-Lubavitch. See *Responsa of the Tzemach Tzedek* (1789-1865), Yoreh Deah sec. 93; see also Moshe Weiner, *Hadras Ponim-Zaken, The Cutting and Growth of the Beard in Halachic Perspective* (1977), pp. 43, 236-242, 302-304, 319-321, 690-691.

SUMMARY OF ARGUMENT

This brief will not echo the compelling arguments made by petitioner. We support his position and believe that all contentions asserted by the respondents are completely and persuasively answered in petitioner's brief.

We urge the Court to make an exception in this case to its usual preference for issuing a judgment on the narrowest available grounds. Merely sustaining petitioner's claim that he may grow a one-half-inch beard in Arkansas' prisons will not resolve the important issues now percolating in the lower courts. Indeed, since petitioner "compromised" his demand in order to be able to

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Czechoslovakian town of Stropkov by trimming his beard – an all too common occurrence. Such actions not only pained the victims, but also allowed the perpetrators to unleash their contempt for the centuries-old culture of European Jewry."

"One of the things that distinguished Orthodox Jewish men was their beards. Many, such as Rabbi Avraham Grodzensky (*pictured)*, shaved their beards, violating Orthodox traditions. He likely shaved it because Orthodox men were more likely to be chosen and abused, even on the streets.")"

wear a beard while the litigation was pending, a narrow ruling in his favor will not give him the full relief to which he is entitled.

Litigation over religiously mandated facial hair in prison and in other surroundings under governmental control has been aggressively fought by State authorities. While the litigation is pending, individuals whose conscientious convictions compel them to retain facial hair are routinely required to shave. This results in ongoing constitutional violations notwithstanding the general rule – articulated by Justice Black in his opinion in *New York Times Co. v. United States*, 403 U.S. 713, 715 (1971) – that "every moment's continuance" of a restriction on First Amendment rights is "a flagrant, indefensible, and continuing" constitutional harm.

Review of analogous cases in which claims were made by Jewish kashrut-observing prisoners for kosher food demonstrates that a narrow holding will not prevent future violations of the First Amendment. The history of lawsuits brought by Orthodox Jews who sought to retain their beards over objections by government agencies also demonstrates that this subject calls for a broad ruling by this Court that will have a prophylactic effect in securing religious liberty.

ARGUMENT

I.

THE RESPONDENTS' JUSTIFICATIONS FOR PROHIBITING A HALF-INCH BEARD ARE FULLY REFUTED BY PETITTIONER'S BRIEF

The petitioner's brief by Professor Laycock – well-known to this Court – has, in our opinion, answered in extensive detail all of the respondents' flimsy contentions purporting to justify the Arkansas' authorities' refusal to permit petitioner to grow a one-half-inch beard while in Arkansas' prisons. We would be performing no service to the Court if we merely echoed the arguments petitioner makes, which we fully support. The inadequacy of respondents' position is demonstrated compellingly by the fact that 44 American prison systems – including the authority governing federal prisons – would not prevent petitioner from complying with his religious belief and growing a one-half-inch beard.

II.

THIS COURT'S RULING SHOULD GO BEYOND THE NARROW QUESTION PRESENTED

We urge this Court, however, to go beyond the narrow facts of this case. Petitioner "compromised" his need to observe the full tenet of his faith in order to be permitted to engage in partial observance while the litigation was ongoing. Hence, as this case is presently structured, a decision in petitioner's favor

will not enable him to comply fully with his religious observance.

The Court can prevent future unjustified limitations on male prisoners' observances of their faith's commands regarding facial hair (including potential claims by Jewish prisoners) by ruling that RLUIPA bars any local prison regulation that limits a prisoner's right to grow facial hair to any length that his religious observance dictates. Petitioner's brief reports that 39 States, the District of Columbia, and the federal government prescribe no fixed length limitation for prison inmates. Brief for the Petitioner 24. Religious prison inmates in the remaining 11 States that do impose a limit on the length of a beard should not have to challenge the wardens of their prisons and bring lawsuits in order to secure fundamental rights protected by RLUIPA based on the First Amendment. Prisoners in these jurisdictions or prisoners whose faith will not permit them to "compromise" on a short beard should not be left dangling following a decision in petitioner's favor in this case. If their rights are in doubt, such prisoners will have to trim or shave their beards in order to avoid prison discipline even while they are asserting their rights in a prison's administrative procedure and in court.

III.

UNLESS THIS COURT ISSUES A BROAD PROPHYLACTIC RULING, CONSTITUTIONALLY PROTECTED RIGHTS OF RELIGIOUS OBSERVANCE WILL BE DENIED

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). The history of prison litigation over the religious rights of inmates in state prisons demonstrates that State jurisdictions act independently and contest prisoners' rights even after the identical prisoner claim has been sustained by a federal court.

The battle over providing kosher food to prisoners in State-administered penal institutions proves this point. In *Willis v. Commissioner, Indiana Dep't of Correction,* 753 F Supp. 2d 768 (S.D. Ind. 2010), Indiana was ordered to provide kosher food to a class of kosher-observing inmates in its prisons. The State appealed the district court's decision to the United States Court of Appeals for the Seventh Circuit, asserting that it was too costly to comply with this judicial decree. *Willis v. Buss*, Seventh Circuit Court of Appeals No. 11-1071. After briefing, including *amicus* submissions by national organizations, Indiana dismissed its appeal and complied with the district court's injunction. Kosher meals are now being provided in the Indiana prisons. The Fifth Circuit also held in *Moussazadeh v. Texas Department of Criminal Justice*, 703 F.3d 781 (5th

Cir. 2012), that kosher food must be provided in Texas' prisons.

These precedents have not, however, prevented the State of Florida from presenting in its federal courts the same flawed argument that kosher meals are too expensive to be provided in its State prisons. An individual prisoner prevailed in the Court of Appeals for the Eleventh Circuit on his demand for kosher meals (*Rich v. Florida Dep't of Corrections*, 716 F.3d 525 (11th Cir. 2013)), but Florida is currently making the same excessive-cost assertion in the Court of Appeals in opposition to an injunction issued on the application of the United States on behalf of all inmates in Florida's prisons. *United States v. Secretary, Florida Dep't of Corrections*, Eleventh Circuit Court of Appeals No. 14-10086-D.

If this Court merely upholds petitioner's right to wear a one-half inch beard, jurisdictions that impose facial-hair restrictions on male inmates of their prisons are likely to continue to battle at each succeeding step. The inevitable result will be that even state prisoners who ultimately prevail in their lawsuits and others similarly situated will, pending the outcome of their litigation, be denied the right protected by the First Amendment and by RLUIPA to grow or retain religiously mandated beards.

IV.

LITIGATION TO PERMIT OBSERVANT JEWS TO WEAR RELIGIOUSLY MANDATED BEARDS HAS BEEN HARD-FOUGHT

The litigation experience of Jewish plaintiffs asserting a religious right to retain facial hair demonstrates that government agencies do not readily acquiesce, even *pendente lite*, in an individual's request to retain a religiously compelled beard. In *Geller v. Secretary of Defense*, 423 F. Supp. 16 (D.D.C. 1976), a Jewish Air Force chaplain who had worn a beard during seven years of service was ordered to shave his beard. When he refused to do so, he was "reassigned to inactive reserve status." Rabbi Geller acknowledged in the litigation brought on his behalf by undersigned counsel that, although Orthodox, he did not believe that wearing a beard was "required" by his religion. Nonetheless, he asserted that his beard was "religiously motivated."

The district court was persuaded after a full hearing "that the wearing of beards, although not required, is a well established religious tradition among members of the Jewish faith." 423 F. Supp. at 17. The court found that "there appears no adequate justification for the inflexible approach of the Air Force" (423 F. Supp. at 18), and it granted summary judgment in Rabbi Geller's favor.

Notwithstanding the precedent of the *Geller* case, the Department of the Army refused in 2009 to permit Menachem Stern, a rabbi affiliated with the Chabad-Lubavitch movement who refused to trim

his beard, to serve as a chaplain. It cited the Army's regulation prohibiting the wearing of facial hair. Stern then initiated litigation, with undersigned counsel as his lawyer, in the United States District Court for the District of Columbia. *Stern v. Secretary of the Army*, Civ. Action No. 10-2077 (JDB). After memoranda of law were filed by both parties, the Department of the Army agreed in 2011 to accept Rabbi Stern as a chaplain in the United States Army. He is presently a captain stationed in Fort Leonard Wood, Missouri, having recently returned from a tour of duty in Afghanistan.

Fishel Litzman is a young man who "follows the rules and traditions of the Chabad Lubavitch Jewish community, and his Orthodox Jewish faith prohibits him from cutting or trimming his facial hair." *Litzman v. New York City Police Department*, 2013 WL 6049066 (S.D.N.Y. 2013). He was accepted to the New York City Police Academy and, in several months of training, ranked in the top 1.3% of his class. But his requests for a religious exemption from a Police Department regulation that prohibited beards exceeding one millimeter in length were denied, and he was terminated in June 2012 from the Police Academy.

Represented by undersigned counsel, Litzman sued the New York City Police Department under 42 U.S.C. § 1983, in the United States District Court for the Southern District of New York, alleging a violation of the First Amendment. In November 2013 the district court granted summary judgment on Litzman's Section 1983 claim. 2013 WL 6049066 at p. 5. The New York Police Department initially filed

a Notice of Appeal but subsequently withdrew its appeal. Litzman was reinstated and he is now a uniformed New York City police officer in Brooklyn.

The justifications asserted by government officials in the cases of chaplains and police officers differ from those put forth in response to claims by prison inmates. Nonetheless, the basic framework is the same and the coercive effect of a no-beard rule is greater in the prison context. An Orthodox Jewish man who is in a penal institution that prohibits the wearing of beards will be forced to violate his religious observance when ordered by the warden to shave his beard. An applicant for a government position as a chaplain or as a policeman may lose a job if he refuses to shave or trim his beard, but he may, at some cost, retain religious observance.

V

THE DECISION IN THIS CASE SHOULD ENCOMPASS A RELATED ISSUE CONCERNING FACIAL HAIR IN STATE PRISONS

Aleph Institute personnel familiar with the entire range of prison regulations and unpublished prison procedures report that in some jurisdictions electric shavers may not be used to trim or remove a prisoner's beard. Wherever such a rule is in force, observant Jewish inmates are compelled to violate the Jewish religious precept that forbids shaving with a razor. No conceivable compelling governmental interest bars use of electric shavers when and if Jewish prisoners must trim or remove their beards. This Court should, in its ruling on male

facial hair in prisons, disapprove practices that prescribe religiously prohibited means for removing facial hair.

CONCLUSION

For the foregoing reasons and those stated in petitioner's brief, the judgment of the court of appeals should be reversed with a decision sustaining a prisoner's right to wear facial hair to any length and with instructions to grant summary judgment to the plaintiff.

Respectfully submitted,

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May 29, 2014

APPENDIX I

The Commandments

Sefer Ha-Mitzvoth of Maimonides

Translated from the Hebrew with foreword, notes, glossary, appendices and indices by Rabbi Dr. Charles B. Chavel

The Soncino Press / London & New York

NEGATIVE COMMANDMENT 44

44 Shaving the beard

By this prohibition we are forbidden to shave the beard, which has five parts: the upper right jaw, the upper left jaw, the lower right jaw, the lower left jaw, and the peak of the beard. The complete prohibition is contained in the words, *Neither shalt thou mar the corners of thy beard*[1], because the whole is included in the term 'beard.' Scripture does not say 'Neither shalt thou mar they beard,' but *Neither shalt thou mar* the corners *of thy beard,* meaning that you may not shave even one corner of the whole beard, which according to Tradition consists of five 'corners', as detailed above, and one is liable to five whippings for shaving his entire beard, even though he saves it off all at once.

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[1] Lev. XIX, 27.

The Mishnah says: '[For shaving off] the beard [one is liable on] five counts: two counts for the right side, two for the left, and one for the lower down. R. Eliezer says: If he took them all of in a single movement, he is liable only on one count'[2] and from this the Talmud concludes: 'Hence (we must conclude) that R. Eliezer considers the whole [process as covered by the] one prohibition.[3]' Thus we have clear proof that the First Sage [i.e. the first of the authorities quoted in the Mishnah] is of the opinion that there are five prohibitions, and that is the law.

[The marring of the beard] was likewise a practice of idolatrous priests, and it is well known that in our day European priests shave off their beards.

The reason why [the prohibition against marring the five corners of the beard is not to be counted as five Commandments is that the prohibition deals with a single matter in a single expression, as we have explained in dealing with the preceding Commandment. The provisions of this Commandment are explained at the end of Makkoth. It is not binding on women.

Note *This prohibition applies only to the marring of the beard with a razor; there is nothing against cutting off the beard with scissors, tweezers, or plane-like or file-like tools (Mishneh Torah, Mada, Hilchoth Abodath Kochabim XII, 7; also, Lev XXI, 5, Rashi).*

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[2] Mak. 20a (Sonc. ed p. 141).

[3] *Ibid,* 21a (Sonc. ed. p. 145).

APPENDIX II

ENCYCLOPAEDIA JUDAICA

Second Edition

Volume 3

BEARD AND SHAVING. The characteristic manner in which the beard and hair were shaved, cut, curled, or groomed identified specific peoples in the ancient world. Egyptian, Assyrian, and Babylonian monuments depict the unique way various peoples treated facial hair, thereby illustrating their ethnic identity. The Semites appear with thick beards or with thin and groomed bears; the Lybians are shown with pointed beards, while the Hittites, Ethiopians, and Sea People are portrayed as clean-shaven. The Babylonians and Persians are represented with curly and groomed beards, and the majority of the images of Egyptian males reveal clean-shaven faces with the exception of a number of pharaohs who appear with plaited beards extending from the chin only. Shaving was performed either by the individual himself or by a barber (Heb. *Galav*) who also attended to bodily ailments in a quasi-medical fashion. Razors were made entirely from metal or from flint blades fixed in a stone handle. Shaving was also connected with cosmetic treatment of the face (see *Cosmetics). According to Leviticus 19:27 and 21:5 in an apparent reference to the hair between the head and the cheeks (sidelocks) it is forbidden to destroy the "corners" of the beard. It is difficult to determine the reason for the ban, but it is possible that it was promulgated in order to differentiate Israelites from other peoples. Another

possible explanation is that shaving specific areas of the face was associated with pagan cults or symbolized those who ministered to their gods and just as the Bible opposes imitation of pagan practices so it opposes this form of ritual shaving. In the Bible shaving of the head and beard is considered a sign of mourning (e.g. Job 1:20) and degradation. Shaving was identified with the spontaneous plucking of the beard, and expression of great sorrow (Ezek. 5:1). To humiliate a man, it was the practice to forcibly shave half of the beard as in 11 Samuel 10:4, where the elders, because of this humiliation, were commanded to hide in Jericho until their beards grew again. Shaving is also part of rituals of purification (Lev. 14:8; Num. 6:9; 8:7). Priests were forbidden to shave the "edges" of their beards (Lev. 21:5), and "the priests, the Levites, the sons of Zadok" (Ezek. 44:15) were allowed neither to shave their heads nor let their locks grow long, but only to trim their hair (*ibid.* 44:20).

[Ze'ev Yeivin]

In Talmudic Times

The Talmud regards the beard as "the adornment of a man's face" (BM84a); a man without a beard was compared to a eunuch (Yev. 80b; Shab.152a). Young priests whose beards had not yet grown were not permitted to bless the people (TJ, Suk. 3:14, 54a). *Sennacherib was punished by God by having his beard shaved off (Sanh. 95b-96a). Rabbinic authorities permitted only those who had frequent dealings with the Roman authorities to clip their beard with forceps (*kom;* BK 83a). Objection to the removal of the beard was on the ground that God

gave it to man to distinguish him from woman; to shave it, was therefore an offense against nature (see Abrabanel to Lev. 19:27).

In the Middle Ages

Jews living in Islamic countries cultivated long beards whereas those in Christian Europe clipped them with scissors. This was permitted by *halakhah.* (Sh. Ar., YD 181:10). Rabbinical courts punished adulterers by cutting off their beards (C.M. Horowitz, *Toratan shel Rishonim*, 1 (1881), 29; 2 (21881), 18). The post of *hazzan* was only bestowed upon a man with a beard (*Bah*, OH 53). Kabbalists ascribed mystical powers to the beard (and hair). Isaac *Luria refrained from touching his, lest he should cause any hairs to fall out (*Ba'er Hetev*, YD 181:5).. With the spread of kabbalism to Eastern Europe, trimming the beard was gradually prohibited by leading rabbinic authorities (*Noda bi-Yhudah, Mahadura Tinyana,* YD 80) and with the rise of Hasidism, the removal of the beard became tantamount to a formal break with Jewish tradition. Nevertheless, from a strictly traditional point of view, shaving was permitted as long as it was done in a certain fashion. *Halakhah* forbids only the shaving proper of the beard; this is defined as the act of removing the hair with an instrument with one cutting edge. Chemical means (depilatory powder), scissors, or an electric shaver with two cuttings edges, are permitted. Although it is customary not to use a single-edge razor to shave any part of the beard, the strict letter of the law forbids its use only for five parts of the face. Considerable difference of opinion among the rabbis as to the exact location of these five places had led to the practice of not using

a single edge at all. In Western Europe and especially among Sephardic Jews, rabbinic authorities (S.D. Luzzatto among others), consented both to the trimming of the beard and even of its entire removal by chemical agents. This became the accepted custom (from the second half of the 17th century). The question of cutting and shaving the beard on *hold-ha-moed*, prohibited by the Talmud (MK 3:1), was a matter of much controversy at the turn of the 19th century. R. Isaac Samuel Reggio tried to prove that this Talmudic injunction no longer applied because of changed circumstances (*Ma'amar ha-Tiglahat,* 1835) but the traditional opinion of the Shulhan Arukh (OH 531) prevails among strictly observant Jews, who also refrain from cutting their beard (and from shaving) during the Omer period (*Sefirah*) and the Three Weeks (see also Mourning Customs). To trim the beard (and have a haircut) in honor of the Sabbath and the festival is regarded as a pious duty. Several rulers (e.g., Nicholas I of Russia) tried to force the Jewish population to cut off their beards and earlocks; others (e.g. Maria Theresa of Austria) ordered Jews to have beards so as to be easily singled out as a foreign element by their Christian neighbors.

AMICUS CURIAE BRIEF

No. 13-6827

IN THE

Supreme Court of the United States

GREGORY HOUSTON HOLT

A/K/A

ABDUL MAALIK MUHAMMAD,

Petitioner,

v.

RAY HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF PRISON FELLOWSHIP MINISTRIES, WORLD VISION, NATIONAL ASSOCIATION OF EVANGELICALS, AND CHRISTIAN LEGAL SOCIETY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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May 29, 2014

QUESTION PRESENTED

Whether the Arkansas Department of Correction's grooming policy violates the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §2000cc *et sec.*, to the extent that it prohibits petitioner from growing a one-half-inch beard in accordance with his religious beliefs.

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INTEREST OF *AMICI CURIAE*[1]

This brief is submitted on behalf of *amici curiae* Prison Fellowship Ministries, World Vision, National Association of Evangelicals, and Christian Legal Society.

Prison Fellowship Ministries is the largest prison ministry in the world, partnering with thousands of churches and tens of thousands of volunteers in caring for prisoners, ex-prisoners, and their families. Founded over 30 years ago by the late Chuck Colson, who served as special counsel to President Nixon and went to prison in 1975 for Watergate-related crimes, Prison Fellowship Ministries carries out its mission as a Christian ministry dedicated to redeeming the damaging effects of sin, crime, and incarceration on individuals, families, and communities.

Relevant to this litigation, Prison Fellowship Ministries (i) provides in-prison seminars, special events, and programs that expose interested prisoners to the Christian message of personal redemption, teach biblical values and their application, and develop leadership qualities and life skills; (ii) develops mentoring relationships that help

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

prisoners mature through coaching and accountability; and (iii) supports released prisoners to enable successful restoration to their families and communities. In this way, Prison Fellowship Ministries fulfills the Bible's call to "remember those in prison as if you were together with them" (Hebrews 13:3.) Meanwhile, through Justice Fellowship, Prison Fellowship Ministries advocates for reforms to the criminal justice system based on biblical principles of restorative justice so communities are safer, victims are respected, and prisoners' lives are restored instead of wasted.

Prison Fellowship Ministries has a strong interest in the correct interpretation and application of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc *et seq.* ("RLUIPA"), the law at issue in this litigation, because issues concerning the accommodation of sincerely held religious belief affect prisoners who are involved in Prison Fellowship Ministries programs and activities, as well as the ability of Prison Fellowship Ministries to conduct those programs and activities. Through Justice Fellowship, Prison Fellowship Ministries supported the passage of RLUIPA and the predecessor legislation to RLUIPA, the Religious Liberty Protection Act, in order to protect religious liberty at the State and local levels.[2]

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[2] *See, e.g., Protecting Religious Freedom After* Boerne v. Flores*: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 3-9 (1997) (testimony of Charles Colson, President, Prison Fellowship Ministries).

Prison Fellowship Ministries believes that encouraging rather than obstructing sincere religious commitment is highly beneficial to prisoners, the environment within prisons, and society at large, because it motivates prisoners to make good choices that benefit themselves and our communities, bringing greater peace and security inside prison in the short term, and outside prison as prisoners are released. For example, a study conducted by the Minnesota Department of Corrections found that participation in InnerChange, a values-based prison program developed by Prison Fellowship Ministries, lowered the hazard of recidivism by 26 percent for rearrest, 35 percent for reconviction, and 40 percent for new offense reincarceration.[3]

World Vision, Inc. is a nonprofit Christian humanitarian organization that, for 64 years, has been dedicated to working with children, families, and their communities in nearly 100 countries to reach their full potential by tackling the causes of poverty and injustice. Motivated by their faith in Jesus Christ, World Vision's employees serve alongside the poor and oppressed as a demonstration of God's unconditional love for all people. World Vision serves all people, regardless of religion, race, ethnicity, or gender. World Vision has a significant stake in this case, as it may impact the ability of

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[3] G. Duwe & M. King, *Can Faith-Based Correctional Programs Work? An Outcome Evaluation of the InnerChange Freedom Initiative in Minnesota*, 57 Int'l J. Offender Therapy & Comparative Criminology 813, 829 (2012), *available at* http://ijo.sagepub.com/content/early/2012/03/14/0306624X12439397.

RLUIPA to fulfill its legislative purpose of subjecting to strict scrutiny governments' denials of exemptions to generally applicable laws in cases of sincere religious exercise by prisoners.

The National Association of Evangelicals ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 41 member denominations, as well as numerous evangelical associations, missions, nonprofits, colleges, seminaries, and independent churches. NAE serves as the collective voice of evangelical churches, as well as other church-related and independent religious ministries. NAE holds that duties to God are prior and superior in obligation to the commands of civil society, that religious freedom is God-given, and therefore that the civil government does not create such freedom but is charged to protect it. It is grateful for the American legal tradition of church-state relations and religious liberty, and believes that this constitutional and jurisprudential history should be honored, nurtured, taught, and maintained.

The Christian Legal Society is an association of Christian attorneys, law professors, and law students dedicated to the defense of religious freedoms. From its inception, members of the Christian Legal Society have fought to preserve the autonomy of religious organizations from government intrusion and entanglement, and to protect the free exercise rights of persons of all faiths. In addition to a long tradition of litigation representations, the Christian Legal Society played

an active role in the drafting and advocacy of RLUIPA.

In 2000, after conducting extensive hearings and finding that various State prison systems were imposing "frivolous or arbitrary" restrictions on prisoners' practice of their religions, 146 Cong. Rec. 7775 (2000) (joint statement of Sens. Orrin Hatch and Edward Kennedy), a *unanimous* Congress enacted RLUIPA, which provided financial incentives to States to provide rigorous protection for the free exercise rights of prisoners. Now, various State agencies and some courts are adopting "interpretations" of RLUIPA's requirements that ignore the statutorily mandated "strict scrutiny" review of any abridgments of prisoners' free exercise rights, and are effectively reading RLUIPA's free exercise safeguards out of existence.

These decisions, if allowed to stand, will have corrosive implications far beyond prison walls. Because RLUIPA expressly incorporates the traditional constitutional strict scrutiny analysis, any effort to "tone down" strict scrutiny in this context could weaken strict scrutiny across the board. As this Court has previously warned, the "watering down" of strict scrutiny in one context will inevitably "subvert its rigor in the other fields where it is applied" *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 888 (1990).

SUMMARY OF ARGUMENT

This is a case about the scope of a State's obligation, under RLUIPA, to accommodate inmates' religious observances once the State has made the decision to accept federal funds subject to RLUIPA's statutory requirements.

It is undisputed that the State of Arkansas has accepted funds tied to RLUIPA's requirements, and so must comply with those requirements. It is undisputed that Petitioner Gregory Holt, an observant Muslim also known as Abdul Maalik Muhammad, believes in good faith that it is a requirement of his religion that men should wear beards. It is undisputed that the Arkansas Department of Correction ("DOC") has refused to allow Mr. Holt to wear even a one-half-inch beard, as he has requested.

Nevertheless, mistakenly relying on conclusory testimony from Arkansas DOC employees concerning strictly hypothetical security risks, and mistakenly guided by an erroneous Eighth Circuit decision, *Fegans v. Norris*, 537 F.3d 897 (8th Cir. 2008), that utterly fails to apply the stringent analysis required by RLUIPA, the District Court dismissed Mr. Holt's RLUIPA claim, and the Circuit Court affirmed that dismissal.

This Court should correct the legal error below, and give full effect to RLUIPA's express mandate that the State shall not place any "substantial burden" on prisoners' free exercise rights unless the State can satisfy the rigorous and well-defined "strict scrutiny" standard. RLUIPA is structured as a

package deal between State prison systems and the Federal Government. States that voluntarily agree to comply with RLUIPA's requirements are granted additional federal funds. In exchange for those funds, those States have agreed that they will not "impose a substantial burden" on an inmate's religious exercise absent a showing that the challenged government policy: (1) "is in furtherance of a compelling governmental interest" and (2) "is the least restrictive means of furthering that compelling governmental interest" 42 U.S.C. § 2000cc-1(a). Perhaps even more importantly—because it gives teeth to these requirements—RLUIPA places a burden on participating States to "*demonstrate*[]" with specific facts that each element is met. *Id.* (emphasis added). Mere speculation or conclusory assertions, without a factual basis and without any analysis of alternatives, simply will not do.

The State of Arkansas failed to make the required showing, and the Eighth Circuit failed to apply the "strict scrutiny" analysis required by RLUIPA.

ARGUMENT

I. RLUIPA REQUIRES THE THOROUGHGOING APPLICATION OF THE TRADITIONAL "STRICT SCRUTINY" TEST.

A. The Elements of the "Strict Scrutiny" Test

The judicially created standard of "strict scrutiny" was adopted to protect this country's most important civil rights from government intrusion. Courts have applied strict scrutiny to government actions that discriminate based on race, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995), regulate the content of free speech, *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813-14 (2000), or impinge on "fundamental rights", *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

The test is undeniably and intentionally exacting: *First*, the government must demonstrate that its action "is in furtherance of a compelling governmental interest" This in turn contains two components: the interest must be "compelling", and the action must be calculated to "further[]" that interest. *Second*, the government must demonstrate that denial of free exercise is the "least restrictive means" available to achieve that interest. *Playboy*, 529 U.S. at 813-14. Integral to both these prongs is a requirement that should be emphasized in its own right: the burden of proof facing the government. "To survive strict scrutiny a State must do more than *assert* a compelling state interest—it must *demonstrate* that its law is necessary to serve the

asserted interest." *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (emphases added). In other words, under well-established law, the State must show that any restriction of religious exercise by prisoners is *actually* necessary to further a compelling State interest, and that there is *no* less restrictive means for the State to achieve that interest.

Given the above, it is not surprising that strict scrutiny has been characterized as this Court's "most rigorous and exacting standard" of review, *Miller v. Johnson*, 515 U.S. 900, 920 (1995) (Kennedy, J.), and that "Only rarely are statutes sustained in the face of strict scrutiny", *Bernal v. Fainter*, 467 U.S. 216, 220 n.6 (1984) (Marshall, J.). *See also United States v. Chovan*, 735 F.3d 1127, 1149 (9th Cir. 2013) (Bea, J., concurring) ("Scholarly analysis shows that federal courts uphold around thirty percent of the laws they analyze under strict scrutiny.").

B. The RLUIPA Statutory Test and the "Strict Scrutiny" Test Are One and the Same.

There should be no dispute that the test required by RLUIPA is exactly the same "strict scrutiny" test developed by this Court for the purpose of protecting our most critical constitutional rights. After this Court held in *Smith* that religious conviction does not entitle one to an exemption from otherwise valid laws of general applicability, 494 U.S. at 877-80, a *unanimous* Congress determined that it nevertheless wished to encourage States to accord the highest level of protection to the free exercise rights of prisoners, whose lives are otherwise so entirely regimented by prison rules of

"general applicability" as to preclude observance of even the most basic commandments of their religions.[4] To accomplish this, Congress imported this Court's articulation of the strict scrutiny test verbatim into the text of RLUIPA.[5] And it is

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[4] In fact, some studies and expert opinion have suggested that encouraging religious conviction and observance among prisoners at least correlates with reduced violence and thus *improved* security within prisons. *See* T.P. O'Connor & M. Perreyclear, *Prison Religion in Action and Its Influence on Offender Rehabilitation*, 35 J. Offender Rehab. 11, 28 (2002) (study concluding that "the more religious sessions an inmate attended, the less likely he was to have an [in-prison] infraction"); T.R. Clear & M.T. Sumter, *Prisoners, Prison, and Religion: Religion and Adjustment to Prison*, 35 J. Offender Rehab. 127 (2002) (study finding that religiosity is often a "principal determinant" in the number of disciplinary infractions that a prisoner receives, with fewer infractions among those prisoners who have greater religious activity and belief); *see also Issues Relating to Religious Liberty Protection, and Focusing on the Constitutionality of a Religious Protection Measure: Hearing Before the S. Comm. on the Judiciary*, 106th Cong. 175 (1999) (statement of Glenn S. Goord, Comm'r, N.Y. State Dep't of Corr. Servs.) ("every correction administrator in the country recognizes the vital role played by most religious practices and beliefs in furthering inmate rehabilitation, in maintaining a sense of hope and purpose among individual inmates and in enhancing overall institutional safety and well-being. Most inmates who sincerely practice their religious beliefs do not pose institutional problems. Rather, as a rule of thumb, they promote institutional stability.").

[5] *Compare* 42 U.S.C. § 2000cc-1(a) (stating that "No government shall impose a substantial burden on the religious exercise" of a prisoner unless the imposition of the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest"), *with Playboy*, 529 U.S. at 813-14 (holding that, in order to satisfy strict scrutiny, a statute

indisputable that a literal importation of this preexisting "strict scrutiny" test into the context of prisoners' free exercise rights was exactly what Congress intended. *See, e.g.*, 146 Cong. Rec. 19123 (2000) (statement of Rep. Charles T. Canady) (explaining that RLUIPA was "intended to codify the traditional compelling interest test"); 146 Cong. Rec. 7778 (2000) (statement of Sen. Reid) (describing the strict scrutiny test to be applied under RLUIPA, which is "the highest standard the courts apply to actions on the part of government"). There is no permission in the statutory text for courts to "dumb down" strict scrutiny in this one particular context by crafting a "strict scrutiny lite" for RLUIPA alone.

Faithful to this statutory background, numerous courts—including this Court—have recognized that RLUIPA applies the standard strict scrutiny test to the context of free exercise within prisons. While *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 430 (2006), concerned the Religious Freedom Restoration Act ("RFRA") rather than RLUIPA, the relevant RFRA statutory language is identical to that of RLUIPA, and there this Court held that "Congress's express decision to legislate the compelling interest test indicates that RFRA challenges should be adjudicated in the same manner as constitutionally mandated applications of the test"

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that regulates speech based on its content "must be narrowly tailored to promote a compelling Government interest" and be the "least restrictive means" to further that interest).

Circuit courts across the country have applied undiluted strict scrutiny when evaluating restrictions on free exercise in the prison setting under RLUIPA. For example, in *Benning v. Georgia*, 391 F.3d 1299, 1304 (11th Cir. 2004), the Eleventh Circuit held that "RLUIPA applies strict scrutiny to government actions that substantially burden the religious exercise of institutionalized persons" The Fourth Circuit has emphasized that Congress deliberately mandated this "more searching standard" of review for claims brought under RLUIPA "than the standard used in parallel constitutional claims: strict scrutiny instead of reasonableness" *Lovelace v. Lee*, 472 F.3d 174, 186 (4th Cir. 2006); *see also Couch v. Jabe*, 679 F.3d 197, 203 (4th Cir. 2012) ("RLUIPA adopts a strict scrutiny standard." (internal quotation marks omitted)). Even the Eighth Circuit, which in this case did *not* apply strict scrutiny, has previously held that strict scrutiny is required in adjudicating claims brought under RLUIPA. *See Gladson v. Iowa Dep't of Corr.*, 551 F.3d 825, 833 (8th Cir. 2009).

It is important to note that RLUIPA also explicitly incorporates the heavy burden of proof that strict scrutiny places on the government not merely to assert, but to "*demonstrate*[]", that the burden on a prisoner's religious exercise (1) "is in furtherance of a compelling governmental interest" and (2) "is the least restrictive means of furthering that compelling governmental interest". 42 U.S.C. § 2000cc-1(a) (emphasis added); *see also Cutter v. Wilkinson*, 544 U.S. 709, 715 (2005); *Burson*, 504 U.S. at 199.

Furthermore, the government's burden under RLUIPA is particularized: it must show that the

policy in question is the least restrictive means to achieve a compelling governmental interest *as applied to the individual prisoner*. RLUIPA states that prisons cannot "impose a substantial burden on the religious exercise of a person residing in an institution even if the burden results from a rule of general applicability" 42 U.S.C. § 2000cc-1(a). Courts have, therefore, interpreted RLUIPA's language as requiring particularized review. *See Gonzales*, 546 U.S. at 430-31 (determining RFRA requires individualized review); *Washington v. Klem*, 497 F.3d 272, 285 (3d Cir. 2007) (inquiring whether the restriction was the least restrictive means available "either facially or as applied to [the plaintiff]."). Thus, it is insufficient for the government to justify its policy as a whole; it must also justify its failure to grant a religious-based exception to the particular prisoner. *See Spratt v. R.I. Dep't of Corr.*, 482 F.3d 33, 39 (1st Cir. 2007) ("The burden thus shifts to [the Rhode Island Department of Corrections] to demonstrate that its ban on inmate preaching, as applied to [the plaintiff], furthers a 'compelling governmental interest' and is the least restrictive means of achieving that interest.").

While the religious accommodation requirements of RLUIPA are strict, no State can complain that they are unfair. The requirements are not absolute mandates on States, but come only as conditions on certain federal grants to State prison systems. Essentially, Congress decided that it considered respect and accommodation of prisoners' free exercise of religion to be an important value, so much so that it was prepared to pay States to commit

to provide that respect and accommodation. A State may excuse itself from *all* of the accommodation requirements of RLUIPA at any time by the simple expedient of declining the grants that RLUIPA offers. This type of federal "package deal" is permissible. *See South Dakota v. Dole*, 483 U.S. 203, 206 (1987) ("Congress may attach conditions on the receipt of federal funds."); *Van Wyhe v. Reisch*, 581 F.3d 639, 652 (8th Cir. 2009) ("If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant."), *cert. denied*, 131 S. Ct. 2149 (2011). For Arkansas to cash the Federal Government's RLUIPA check while refusing to deliver the "purchased" free exercise rights for prisoners, however, is neither lawful nor fair.

As discussed below, the lower courts in this case erred in not holding Arkansas to its bargain by requiring accommodation of sincere religious observances, with exceptions permitted only under a strict scrutiny analysis. However, the lower courts here were not alone in this error. The Eleventh Circuit, addressing a RLUIPA challenge to Alabama's prison grooming policy, has also wrongly allowed prisons to limit religious exercise based on mere hypotheses and generalized assertions from prison officials about security, without applying statutorily required "strict scrutiny" *See Knight v. Thompson*, 723 F.3d 1275 (11th Cir. 2013), *petition for cert. filed* (U.S. Feb. 6, 2014) (No. 13-955). That case and the decisions below threaten to nullify Congress's protection of prisoners' free exercise rights and to erode the meaning of "strict scrutiny"

II. THE COURTS BELOW ERRED BECAUSE THEY FAILED TO APPLY ANY "LEAST RESTRICTIVE MEANS" ANALYSIS.

A. Preliminary Elements

We touch only briefly on elements that lead up to the "least restrictive means" analysis.

The Magistrate Judge held that "Mr. [Holt's] ability to practice his religion has not been substantially burdened" Joint Appendix ("J.A.") at 176-77, *Holt v. Hobbs*, No. 13-6827 (Apr. 23, 2014). The Eighth Circuit did *not*, however, endorse or base its holding on this conclusion, and this Court should not do so either, because the Magistrate Judge's analysis was improper. *First*, he explained that Mr. Holt had had enough *other* opportunities to practice his religion in prison, including by being "provided a prayer rug and a list of distributors of Islamic material", and by being "allowed to correspond with a religious advisor", "to maintain the required diet", and to "observe religious holidays" J.A. at 176-77. But this is like saying that seven out of the Ten Commandments are quite enough for anyone to observe—a fraught evaluation the State has no business entering into, and that RLUIPA certainly does not authorize.[6] The fact that

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[6] *See Mayfield v. Tex. Dep't of Crim. Justice*, 529 F.3d 599, 613-615, 617 (5th Cir. 2008) (reversing grant of summary judgment for the State in a RLUIPA case, and rejecting the State's argument that the inmate could simply worship alone in his cell, rather than in a group, as the inmate contended was necessary under his religion).

Mr. Holt is permitted to do *some* things required by his religion does not excuse the State from showing that its prohibition against his doing *other* things required by his religion furthers a compelling State interest and is the "least restrictive means" available of doing so. *Second,* the Magistrate Judge elsewhere stated, and may have been swayed by, the undoubted fact that "not all Muslims believe a man must maintain a beard" J.A. at 166. But again, this is like asserting that, because not *all* Jews keep kosher, keeping kosher must not be a "big deal" for *any* Jews. It is a non sequitur, and false on its face.

Certainly, there is no dispute that prison security may be a "compelling state interest" But the government's burden only begins—and does not end—there.

Whether Arkansas introduced any evidence that could remotely meet its burden of "demonstrating" that a ban on very short beards "furthers" its security interests in any identifiable way is doubtful. Two speculative justifications were offered: a concern that contraband might be concealed in beards, and a concern that beards could permit escaping prisoners to alter their appearance. But no supporting evidence beyond the merest speculation was offered to back up either concern.

As to concealing contraband, the Warden of the unit in which Mr. Holt is imprisoned testified that he could not recall a single recent incident in which his prison "actually had people hiding contraband in their hair", let alone in a very short beard, J.A. at 110, and the Magistrate Judge opined on the record that "it's almost preposterous to think that you could

hide contraband in your beard", J.A. at 155.[7] As to facilitating escape, when asked by Mr. Holt if there have "been a whole lot of escapes from the Department of Correction because people were wearing beards", the Warden testified, "Not as of recent years, thank goodness", and went on to "recall one back in the 70s or 80s", where the prisoner in fact escaped "*clean shaven* and grew the beard *after* he got out" J.A. at 105 (emphases added). Needless to say, the anti-beard policy does nothing to address that problem.

But what is beyond dispute is that Arkansas put in no evidence at all that could justify a finding that its policy against short beards is the "least restrictive means" of achieving its security goals. Equally beyond dispute is that the courts below failed to conduct any "least restrictive means" analysis at all. This was error.

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[7] One may contrast a recent RLUIPA case in which a prohibition on dreadlocks was supported by specific and credible evidence concerning the ability of inmates to conceal substantial and dangerous objects therein. *See Williams v. Snyder*, 367 F. App'x 679, 683 (7th Cir. 2010) (unpublished). Needless to say, dreadlocks and a half-inch beard present rather different opportunities for concealment.

B. Arkansas Neither Attempted To Meet Nor Met Its Burden of Establishing that Its Restriction on Short Beards Is the Least Restrictive Means of Addressing Its Security Concerns.

The State of Arkansas failed in this case to attempt any showing whatsoever that its refusal to accommodate Mr. Holt's religious grooming requirements was the "least restrictive means" by which it could protect its interest in prison security. Given that at least 44 prison systems around the nation—including maximum security prisons—do *not* impose a categorical ban on short beards, *see* Brief for Petitioner at 24-26, *Holt v. Hobbs*, No. 13-6827 (May 22, 2014), it is logically almost impossible to conceive how the Arkansas DOC could have made that showing here.

At the hearing before the Magistrate Judge, the Warden was asked if Arkansas's "grooming policy make[s] any allowances for any type of religious exemptions". J.A. at 87. He responded succinctly, "No, ma'am" J.A. at 87. Yet the vast majority of States, and the federal system, *do* provide such accommodations to observant Muslim prisoners who wish to grow short beards, apparently believing that they can do so without sacrificing necessary security. *See* D. Sidhu, *Religious Freedom and Inmate Grooming Standards*, 66 U. Miami L. Rev. 923, 964-72 (2005) (reviewing prison grooming policies and finding that 39 States, the United States, and the District of Columbia allow beards for religious or other reasons). Despite the readily available evidence of widespread American prison practice inconsistent with Arkansas's absolute beard

prohibition, the Arkansas DOC's Assistant Director, when asked at the hearing if he was aware of what other States are doing in the grooming context, testified, "No, ma'am, not specifically. I'm really not", J.A. at 119, while the Warden admitted that "I don't know what goes on nationally across the country", J.A. at 105, and testified that "I suppose maybe [permitting short beards under a religious observance exception is] an individual preference in those states. I can't tell you for what reason they've elected or chosen to go that route." J.A. at 101.

As this testimony suggests, the State of Arkansas totally failed to examine or consider any alternatives to its absolute rule against beards. But in the context of a "least restrictive means" analysis, ignorance is not bliss. Given the State's failure to consider *any* alternatives to a prison rule prohibiting what many Muslims believe to be a religious mandate, several questions remain unanswered—and even unasked.

How do all these other State and federal prison systems—which necessarily have similar security interests to Arkansas's—allow prisoners to grow short beards in accordance with their religious convictions without triggering the security problems that Arkansas predicts? *See Warsoldier v. Woodford*, 418 F.3d 989, 999-1000 (9th Cir. 2005) ("[F]ailure of a defendant to explain why another institution with the same compelling interests was able to accommodate the same religious practices may constitute a failure to establish that the defendant was using the least restrictive means.").

Why is the State of Arkansas able to accommodate prisoners with medical conditions, consistent with security concerns, *see* Ark. Dep't of Corr., Ark. Admin. Directive 98-04 ("Medical staff may prescribe that inmates with a diagnosed dermatological problem may wear facial hair no longer than one quarter of an inch."), yet can think of no way to provide exceptions for religious reasons? *See Couch*, 679 F.3d at 204 ("The [government's] affidavits fail to explain how the prison is able to deal with the beards of medically exempt inmates but could not similarly accommodate religious exemptions.").

How is it that Arkansas is able to administer medical exceptions to the enforced shaving rule that permit a quarter-inch beard, but asserts that the administration of a half-inch beard rule is not feasible? The mechanics of administering either rule are the same; as the Warden admitted, "I mean, you could start, I guess, with a particular clipper guard that's a particular length" J.A. at 84. *See Couch*, 679 F.3d at 203 ("The [government's] affidavit was also deficient because it failed to explain how the prison could accommodate other exceptions to the grooming policy but could not accommodate a religious exception.").

These are the types of questions the "least restrictive means" analysis would necessarily ask. And even to ask these questions is to realize that there can be no good answer. A jury would very likely find that Arkansas's purported security concerns are mere pretext for a system that simply cannot be bothered to make accommodations for religious observance.

Notably, the American Correctional Association ("ACA"), in a 2011 "Accreditation Report", found that the precise Arkansas grooming policy at issue in this case, as enforced against the general prison population, is *not* the least restrictive means necessary to meet the Arkansas DOC's interest in security. Instead, the ACA Visiting Committee, in its initial report, concluded that Arkansas did not "validate[] any security, identification or sanitation interest in establishing and enforcing an inmate appearance and grooming code that denies inmates freedom in personal grooming" Am. Corr. Ass'n, Accreditation Report, Comm'n on Accreditation for Corr. (2011) at 250-51, *available at* http://adc.arkansas.gov/Documents/ADC-ACA-Reports.pdf. When the Arkansas DOC appealed this finding, the ACA "Auditor" affirmed this conclusion in no uncertain terms, finding that:

> "While certain extreme grooming options on the part of inmates could potentially interfere with contraband control and identification, the policy referred to appears to be *more limiting than is necessary.* The auditors felt the limits were *more restrictive than required by good correctional practice*
>
> The auditors support reasonable grooming standards that prohibit extreme styles but feel that the Arkansas policy *exceeds necessary limits.*"

Id. at 251 (emphases added). The Auditor went on to highlight the less restrictive means of promoting prison security that had been adopted in other

jurisdictions, observing that "Many correctional systems address the identification issue by requiring offenders to take new photographs for IDs and file pictures, at offender expense" *Id.*[8] But Arkansas never changed its practice. Indeed, if the testimony of the State's witnesses in this case is to be believed, Arkansas never even considered these alternative, less restrictive practices.

C. The Courts Below Erred in Applying a Standard that Did Not Even Approximate "Strict Scrutiny".

If the ruling below is permitted to stand, then the "least restrictive means" requirement has been simply erased from RLUIPA.

Although the Magistrate Judge stated during Mr. Holt's hearing that the case "requires an individual and particular analysis", J.A. at 50, and that "this is a pretty close call in this case", J.A. at 153, he did not apply strict scrutiny. In fact, in the Magistrate Judge's Proposed Findings and Recommendations following the hearing, he did not provide a *single* rationale for his conclusion that the prohibition against Mr. Holt's free exercise "was the least restrictive means available" J.A. at 176.

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[8] *Amici* recognize that, on further appeal of this issue to the Accreditation Commission Panel, the Panel "granted" that appeal without explanation in the record of the review. *Id.* at 228. However, that decision presumably related to the ACA's accreditation standards, not to strict scrutiny's "least restrictive means" requirement, and neither contradicts nor takes away from the observations of the ACA Visiting Committee and Auditor quoted above.

Instead, the Magistrate Judge collapsed the first and second prongs of RLUIPA's strict scrutiny analysis, finding that a "compelling penological interest" combined with an obligation of "deference" to prison officials essentially relieved the State of its burden to show "least restrictive means" J.A. at 176 ("'Although prison policies from other jurisdictions provide some evidence as to the feasibility of implementing a less restrictive means of achieving prison safety and security, it does not outweigh the deference owed to the expert judgment of prison officials who are infinitely more familiar with their own institutions than outside observers.'" (quoting *Fegans*, 537 F.3d at 905)).[9]

Unfortunately, neither the District Court nor the Eighth Circuit cured the deficiencies in the Magistrate Judge's recommendation. The District Court adopted the recommendation without explanation, holding only that "the proposed findings and recommended disposition should be, and hereby are, approved and adopted in their entirety in all respects" J.A. at 179. The Eighth Circuit got off on the wrong foot by describing, but leaving

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[9] The Magistrate Judge's concluding remarks at the hearing betray this same view, based on Eighth Circuit case law and contrary to the plain language of RLUIPA, that the State need not show "least restrictive means" if it can establish a "compelling governmental interest" J.A. at 154 ("you've done a good job, Mr. Muhammad, of distinguishing the fact that you want the half inch, that *Fegans* was arguing for a more—more freedom in growing his beard, but the principles are still the same. The principles are, as I said, *deference to the prison officials if they're able to state legitimate penological needs*. And I think they have done so." (emphasis added)).

unquestioned, the Magistrate Judge's "seven out of ten isn't bad" mode of analysis, emphasizing the other religious requirements that Mr. Holt *is* able to comply with, as though this lightened the State's obligation under RLUIPA with respect to the rule concerning beards that is at issue in this case, J.A. at 185-86, and then completely flipped the statutory burden of proof with respect to "least restrictive means" by asserting that "absent substantial evidence in [the] record indicating that [the] response of prison officials to security concerns is exaggerated, courts should ordinarily defer to their expert judgment in such matters", J.A. at 186 (citing *Fegans*, 537 F.3d at 903).

The court then provided the following "least restrictive means" analysis: "we conclude that defendants met their burden under RLUIPA of establishing that [the Arkansas DOC's] grooming policy was the least restrictive means of furthering a compelling penological interest, notwithstanding Mr. Holt's citation to cases indicating that prisons in other jurisdictions have been able to meet their security needs while allowing inmates to maintain facial hair" J.A. at 186 (citation omitted). That is the entirety of the Eighth Circuit's "least restrictive means" analysis. That is not strict scrutiny.

The Magistrate Judge and the Eighth Circuit misunderstood the nature of the "deference" that is appropriate in the RLUIPA context. As the Fourth Circuit (in an opinion joined by Retired Associate Justice Sandra Day O'Connor) has explained, the requirement that "the government, consistent with the RLUIPA statutory scheme, acknowledge and give some consideration to less restrictive alternatives" is

not inconsistent with the obligation to defer to the judgment of prison officials. *Couch*, 679 F.3d at 203-04 (vacating grant of summary judgment where affidavits offered by prison officials failed to show that the grooming policy was the least restrictive means to further health and security concerns).

It is of course true that courts are to give deference to the expertise and judgment of prison officials on matters of security and discipline. *See Cutter*, 544 U.S. at 723. It is *not* true that this deference amounts to a free pass on the "least restrictive means" test, and permits prison officials to prevail based on mere say-so; purely "speculative testimony cannot satisfy [the State's] burden" *Garner v. Kennedy*, 713 F.3d 237, 246 (5th Cir. 2013) (finding that the State had not carried its burden of proving that its grooming policy was the least restrictive means available, where the State offered "no studies" or "concrete evidence" in support of its witnesses' testimony); *see also Yellowbear v. Lampert*, 741 F.3d 48, 59 (10th Cir. 2014) ("the deference this court must extend the experience and expertise of prison administrators does not extend so far that prison officials may declare a compelling governmental interest by fiat.").

Furthermore, strong authority emphasizes that the "least restrictive means" prong is a vital and separate requirement that cannot be satisfied or elided by some vague combination of "compelling penological interest" with "deference" This Court defined the "least restrictive means" element in the strongest possible terms in *Cutter*, citing with approval the district court's requirement of "[a] finding 'that it is *factually impossible* to provide the

kind of accommodations that RLUIPA will require without significantly compromising prison security or the levels of service provided to other inmates'" 544 U.S. at 725. Several circuit courts analyzing grooming policies under RLUIPA have similarly held that "the Government must *consider and reject other means* before it can conclude that the policy chosen is the least restrictive means" *Couch*, 679 F.3d at 203 (internal quotation marks omitted) (emphasis added); *see also Warsoldier*, 418 F.3d at 999 ("[The government] cannot meet its burden to prove least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice."); *Spratt*, 482 F.3d at 41 (same); *Washington*, 497 F.3d at 284 ("In other strict scrutiny contexts, the Supreme Court has suggested that the Government must consider and reject other means before it can conclude that the policy chosen is the least restrictive means. In light of the statute's text and legislative history, we agree with the Ninth Circuit in *Warsoldier* that this requirement applies with equal force to RLUIPA." (citations omitted)).

Although the Eighth Circuit did not perform the careful and exacting analysis required by RLUIPA and the case law applying it, even that court has previously recognized that the State in a RLUIPA case must consider alternative means in order to meet the "least restrictive means" test, and that the "compelling governmental interest" and "least restrictive means" analyses are distinct. *See Murphy v. Mo. Dep't of Corr.*, 372 F.3d 979, 989 (8th Cir. 2004) ("We cannot conclude that [the Missouri Department of Corrections ('MDOC')] has met its

burden of establishing that its limitation on [the prisoner's] religious practices constituted the least restrictive means necessary", where, among other things, "It is not clear that MDOC seriously considered any other alternatives, nor were any explored before the district court."), *cert. denied*, 543 U.S. 991 (2004); *Native Am. Council of Tribes v. Weber*, __ F.3d __, 2014 WL 1644130, at *7 (8th Cir. Apr. 25, 2014) (affirming the district court's finding of a RLUIPA violation even where a State employee "testif[ied] that some of the alternatives were 'talked about,'" because "the defendants offered no evidence that they *meaningfully* considered any of the alternatives or *tested* the effectiveness of such alternatives before effectuating the tobacco ban." (emphases added)).

The facts here, where the evidence indicates that the Arkansas DOC did not give any consideration and analysis at all to alternatives to its "no beards" policy, fall far from anything to which a court could and should defer as it conducts its "least restrictive means" analysis.

CONCLUSION

For the foregoing reasons, *amici curiae* Prison Fellowship Ministries, World Vision, National Association of Evangelicals, and Christian Legal Society respectfully request that this Court give effect to the statutory choice to require accommodation of prisoners' religious observances subject only to exceptions that can survive the rigorous requirements of strict scrutiny, and that it reject the invitation of the State of Arkansas and the Eighth Circuit to sanction a new "not-so-strict scrutiny" standard to be applied in RLUIPA cases. The Court should reverse and remand with instructions to proceed consistently under the well-established definition of strict scrutiny.

May 29, 2014

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AMICUS CURIAE BRIEF

No. 13-6827

In The Supreme Court of the United States

GREGORY HOUSTON HOLT
A/K/A ABDUL MAALIK MUHAMMAD,
Petitioner,

v.

RAY HOBBS, DIRECTOR, ARKANSAS
DEPARTMENT OF CORRECTION, *ET AL.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

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QUESTION PRESENTED

Whether the Arkansas Department of Correction's grooming policy violates the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc *et seq.*, to the extent that it prohibits Petitioner from growing a half-inch beard in accordance with his religious beliefs.

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INTEREST OF *AMICUS*[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing pro bono legal representation to individuals whose civil liberties are threatened and in educating the public about constitutional and human rights issues.

The Rutherford Institute is interested in this case because the Institute was one of the moving forces behind the drafting and enactment of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc *et seq.*, and it has and continues to represent the individuals, religious assemblies, and institutions that are the intended beneficiaries of RLUIPA. A decision affirming the Eighth Circuit would undermine RLUIPA and eviscerate the religious liberty protections Congress intended to provide through the statute.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of *amicus* briefs have been filed with the Clerk of the Court.

STATEMENT OF THE CASE

Petitioner Gregory Holt (a/k/a Abdul Maalik Muhammad), a Salafi Muslim, is a prisoner in the Arkansas Department of Correction ("ADC"). *See* JA 162. One essential tenet of his faith is to follow the sayings of the Prophet Muhammad as collected in the *hadith*. This includes the requirement to "keep the mustaches short [but] leave the beard as it is." JA 54; *see also* JA 142.

The ADC grooming policy, however, prohibits prisoners from growing beards:

> No inmates will be permitted to wear facial hair other than a neatly trimmed mustache that does not extend beyond the corner of the mouth or over the lip. Medical staff may prescribe that inmates with a diagnosed dermatological problem may wear facial hair no longer than one quarter of an inch.

JA 164 (citing Ark. Admin. Directive 98-04). The alleged purpose of the ADC grooming policy is to "provide for the health and hygiene of incarcerated offenders, and to maintain a standard appearance throughout the period of incarceration, minimizing opportunities for disguise and for transport of contraband and weapons." *Id.*

Petitioner requested an exemption to grow a half-inch beard to accommodate his religious beliefs. *See, e.g.*, JA 56. The State denied the request on account of alleged security concerns. *Id.* Petitioner then challenged the ADC grooming policy under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). JA 16-26.

Magistrate Judge Joe Volpe held an evidentiary hearing, at which the State presented various prison officials as witnesses. JA 48-159. The prison officials testified that the ADC grooming policy served security concerns, particularly to prevent prisoners from transporting contraband (*e.g.*, razors, needles, SIM cards), and to prevent prisoners from changing their appearance. *See, e.g.*, JA 166. The magistrate recommended that the district court deny Petitioner's motion for preliminary injunction and that the court dismiss the complaint. JA 177.

The district court adopted the report and recommendation in its entirety and dismissed Petitioner's complaint with prejudice. JA 179. First, the district court concluded that Petitioner would not be irreparably harmed because "not all Muslims believe a man must maintain a beard. [and Petitioner] testified that followers of his faith get credit for attempting to follow the religious tenets." JA 166. Petitioner, moreover, was able to practice his religion and allowed to have a prayer rug and other Islamic material, to maintain an Islamic diet,

to observe religious holidays, and to correspond with a religious advisor. JA 177.[2] Second, the court found the prisoner officials' security concerns persuasive. *See, e.g.*, JA 166-68. Warden Lay testified that with a beard, an "inmate could change his appearance during an escape [and that a beard could be] used as a means to facilitate the introduction of contraband into the inmate population." JA 166. Assistant Director Harris testified that a "needle from a syringe" or "a SIM card could be easily concealed in an inmate's beard." JA 167.

Petitioner appealed, and the Eighth Circuit affirmed based on its prior decision in *Fegans v. Norris*, 537 F.3d 897 (8th Cir. 2008). JA 184-87. This Court granted *certiorari*.

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[2] During the evidentiary hearing, however, the court repeatedly implied that Petitioner met his initial burden and that the issue was whether the State's security concerns could survive strict scrutiny. *See, e.g.*, JA 77 ("[U]ltimately it boils down to whether or not the -- whether or not we can have the ADC meeting their security objectives without substantially burdening your religious freedom. I mean, that's it in a nutshell. And so it really is incumbent on them -- the way it works, Mr. Muhammad is that they have to ante up now, they have to say we can't do it, we can't allow you to grow this beard because of whatever the reasons are."); JA 135 (permitting the state to present closing arguments first because "you know, it's kind of your burden, Ms. Cryer, I think, so if you want to go first").

SUMMARY OF THE ARGUMENT

RLUIPA provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . unless the government demonstrates that imposition of the burden on that person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1. Courts apply strict scrutiny in resolving RLUIPA claims, requiring that the government demonstrate that it considered and rejected less restrictive means before adopting the challenged policy. The ADC grooming policy violates this standard.

The first issue is whether the State's prohibition of beards substantially burdens Petitioner's genuine religious belief. Petitioner is a Salafi Muslim, whose religious beliefs require him to maintain a beard. The ADC policy requires Petitioner to be clean-shaven and denies him the right to grow a beard. As such, it significantly burdens Petitioner's exercise of his religious beliefs.

The second issue is whether the State's no-beard policy is the least restrictive means to further the government's interest in prison security. Here, the State concededly failed to consider alternatives, including the experience of most other states that have permitted inmates to wear beards without

experiencing security concerns. The State's failure to consider these alternatives was particularly egregious in light of its inability to cite a single security incident that resulted from an inmate wearing a beard.

ARGUMENT

I. The ADC Grooming Policy Is Not the Least Restrictive Means to Further a Compelling Governmental Interest

Section 3 of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §§ 2000cc *et seq.*, prohibits the government from "impos[ing] a substantial burden on the religious exercise of a person residing or confined to an institution . . . unless the government demonstrates that imposition of the burden . . . (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling interest." 42 U.S.C. § 2000cc-1(a).

A. Prohibiting a Half-Inch Beard Substantially Burdens Petitioner's Religious Exercise

The plaintiff bears the initial burden to demonstrate that the challenged governmental action substantially burdens his religious exercise. 42 U.S.C. § 2000cc-2(b); *Garner v. Kennedy*, 713 F.3d 237, 241 (5th Cir. 2013) (citation omitted). "Religious exercise" is broadly defined as "any

exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). Although this Court has not had the opportunity to interpret what constitutes a "substantial burden" under RLUIPA, lower courts consistently accept a plaintiff's claim that the challenged activity "truly pressures [the plaintiff] to significantly modify his religious behavior and significantly violates his religious belief." *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006); *Ind v. Colo. Dep't of Corr.*, No. 09-cv-537, 2014 WL 1312457, at *11 (D. Colo. Mar. 31, 2014) (similar); *Hundal v. Lackner*, No. 08-cv-00543, 2011 WL 1935734, at *5 (C.D. Cal. Apr. 12, 2011) (similar).

Although Respondent has not seriously disputed that Petitioner's exercise of religion has been substantially burdened by the no-beard policy, the rulings below are ambiguous on this threshold issue. The magistrate's report and recommendation, JA 160-78, which was adopted *in toto* by the district court, concluded that Petitioner's "ability to practice his religion has not been substantially burdened." JA 176-77. Petitioner was "provided a prayer rug and list of distributors of Islamic material, [ ] was allowed to correspond with a religious advisor, and was allowed to maintain the required diet and observe religious holidays." JA 176, 177. The court also pointed out that not all Muslims believe a man must maintain a beard. JA 166. *But see supra* note 2 (trial court commented during the evidentiary

hearing that Petitioner met the threshold burden and the burden was on the state to show a compelling interest).

But it is not for a court to say what aspect of a prisoner's religious beliefs is important to him, nor does RLUIPA require a prisoner to choose only the most important tenets he would like to follow. *Ind*, 2014 WL 1312457, at *11 (courts may not "attempt to gauge how central a sincerely held belief is to the believer's religion") (citation omitted). The district court's approach is akin to prohibiting a Christian prisoner from praying because he is allowed to celebrate Christmas and Easter. Instead, lower courts have held that a "consistent restriction or flat denial of access to something" is a substantial burden. *Id.* at *12 (citations omitted). Petitioner easily satisfies this standard: the State's flat denial of his request to maintain a half-inch beard significantly modifies and, in fact, violates his Islamic beliefs.

To the extent the district court ruled that there was no substantial burden because maintaining a beard is not a uniform tenet among Muslim men, that holding directly conflicts with this Court's precedent. In *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), a Jehovah's Witness quit his job because his religious beliefs prohibited him from participating in the manufacture of armaments. *Id.* at 709. He challenged the state's rejection of unemployment

compensation benefits as violative of his First Amendment right to free exercise of religion. *Id.* This Court did not give any weight "to the fact that another Jehovah's Witness had no scruples about [manufacturing armaments]." *Id.* at 715. "[T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith." *Id.* at 715-16.

Similarly, in *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989), this Court held that a claim to the protection of the First Amendment's Free Exercise Clause requires only that the religious belief be sincere. The Court rejected the notion that "one must be responding to the commands of a particular religious organization." *Id.* at 834. The fact that other Christians failed to share the plaintiff's belief that Sunday work is forbidden did not diminish the constitutional protection of the plaintiff's belief.

Thus, even if Petitioner's belief that he must maintain a beard were wholly personal and idiosyncratic (which it demonstrably is not), his belief is protected by the constitutional guarantee to free exercise of religion and by federal statutory law. RLUIPA makes plain, by defining of "religious exercise" as "any exercise of religion, whether or not

compelled by, or central to, a system of religious belief," 42 U.S.C. § 2000cc-5(7)(A), that the scope of beliefs protected is as broad as the protection afforded by the First Amendment's Free Exercise Clause under *Thomas* and *Frazee*. The clear substantial burden on Petitioner's exercise of religion cannot be avoided because the belief at issue is not universal; it is enough that it is sincerely held.

B. The District Court Failed to Apply the Required Strict Scrutiny Test, Because It Refused to Consider Less Restrictive Alternatives

Once a plaintiff meets his initial burden, the burden shifts to the government to demonstrate the challenged action is the least restrictive in furthering a compelling interest. 42 U.S.C. § 2000cc-5(2); *Garner*, 713 F.3d at 241.[3]

A prison policy cannot comply with RLUIPA unless it furthers a compelling governmental interest and is the "least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a)(2). Consistent with the plain text of the statute, courts apply strict scrutiny in analyzing RLUIPA. *See, e.g.*, *Couch v. Jabe*, 679

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[3] Although the parties did not address whether Petitioner's requested exception to the ADC grooming policy would result in burdensome costs to the State, RLUIPA recognizes that the government may need to incur some expenses to avoid substantially burdening the exercise of religion. *Garner*, 713 F.3d. at 245.

F.3d 197, 203 (4th Cir. 2012) ("'RLUIPA adopts a strict scrutiny' standard.") (citations omitted); *Warsoldier v. Woodford*, 418 F.3d 989, 1001 n.13 (9th Cir. 2005) ("[U]nder RLUIPA, [the state's] regulations must survive strict scrutiny.") (citing 42 U.S.C. § 2000cc-1(a)).[4]

Courts do not require the government to consider every possible alternative to survive RLUIPA's strict scrutiny standard. *Hamilton v. Schriro*, 74 F.3d 1545, 1556 (8th Cir. 1996). At the same time, courts may not "rubber stamp or mechanically accept the judgments of prison administrators." *Couch*, 679 F.3d at 201 (citing *Lovelace*, 472 F.3d at 190) (alterations and internal quotation marks omitted); *see also id.* at 203; *Washington v. Klem*, 497 F.3d 272, 283 (3d Cir. 2007) (courts may defer to prison officials regarding security concerns of a challenged activity, but the

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[4] *See also Lovelace*, 472 F.3d at 186 ("[B]y passing RLUIPA, [Congress] mandat[ed] a 'more searching standard' of review of free exercise burdens than the standard used in parallel constitutional claims: strict scrutiny instead of reasonableness.") (citations omitted); *Ind*, 2014 WL 1312457, at *15 ("In enacting RLUIPA, Congress chose to subject prison regulations which substantially burden an inmate's religious beliefs to the 'most demanding test known to constitutional law.' 'Whereas rational basis review permits a court to hypothesize interests that might support a decision, RLUIPA's strict scrutiny standard requires courts to consider only the actual reasons for a decision.'") (citations omitted).

"mere assertion of security or health reasons is not, by itself, enough for the Government to satisfy the compelling governmental interest requirement") (citations omitted).

The unambiguous terms of RLUIPA require the government to satisfy a "strict scrutiny" test by showing that the prohibited religious practice is the "least restrictive means of furthering th[e] compelling governmental interest." 42 U.S.C. § 2000cc-1(a)(2). This Court has routinely interpreted strict scrutiny to require consideration and rejection of less restrictive alternatives. *See, e.g., United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 824 (2000) (in First Amendment challenge to speech restrictions, "[a] court should not assume a plausible, less restrictive alternative would be ineffective"); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989) (because city failed to consider race-neutral measures, minority set-aside program was not narrowly tailored to further a compelling governmental interest).[5]

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[5] The circumstances behind the statute's passage confirm this reading. In passing RLUIPA, Congress warned that "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements." 146 Cong. Rec. S7774, S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch & Sen. Kennedy) (citation omitted). Indeed, one of the stated purposes of RLUIPA was to "secure redress for inmates who encountered undue barriers to their

The Department of Justice concurs that RLUIPA's strict scrutiny test requires a state to substantively consider and reject less restrictive alternatives:

> RLUIPA require[s] that administrators *support their assertions of appropriateness with specific evidence*. Bare assertions that a religious accommodation will compromise the security or integrity of an institution will not suffice. [C]ourts have required institutions to show that alternatives means of satisfying the compelling government interest *were considered and found insufficient.*

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religious observances. RLUIPA thus protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion." *Cutter v. Wilkinson*, 544 U.S. 709, 716-17, 721 (2005) (citations omitted); 146 Cong. Rec. S7774, S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch & Sen. Kennedy) (noting that "Congress has long acted to protect the civil rights of institutionalized persons [whose] right to practice their faith is at the mercy of those running the institution"). RLUIPA's legislative history thus makes clear that Congress intended the statute to be interpreted broadly and to allow for the greatest exercise of religious freedom.

Dep't of Justice, *Statement of the Department of Justice on the Institutionalized Persons Provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA)* 3-4 (Sept. 22, 2010), *available at* http://www.justice.gov/crt/ rluipa_q_a_9-22-10.pdf (emphases added). *See also* Brief for the United States at 10-14, *Thunderhorse v. Pierce*, No. 09-1353 (U.S. Dec. 2010) (noting that under RLUIPA, courts uniformly require the government to show it considered but rejected alternative means) [hereinafter "U.S. Amicus Br. in *Thunderhorse*"].

Nine federal circuit courts also have agreed that the statute requires a state to consider less restrictive alternatives before prohibiting a challenged religious activity. *See, e.g.*, *Spratt v. R.I. Dep't of Corr.*, 482 F.3d 33, 41 n.11 (1st Cir. 2007) ("[T]o meet the least restrictive means test, prison administrators generally ought to explore at least some alternatives, and their rejection should generally be accompanied by some measure of explanation."); *see also, e.g.*, *Couch*, 679 F.3d at 202; *Ali v. Quarterman*, 434 F App'x 322, 325 (5th Cir. 2011); *Jova v. Smith*, 582 F.3d 410, 416 (2d Cir. 2009); *Koger v. Bryan*, 523 F.3d 789, 800 (7th Cir. 2008) *Washington*, 497 F.3d at 284; *Hoevenaar v. Lazaroff*, 422 F.3d 366, 370 (6th Cir. 2005); *Murphy*

v. Mo. Dep't of Corr., 372 F.3d 979, 989 (8th Cir. 2004); *Warsoldier*, 418 F.3d at 999.[6]

Only the Eleventh Circuit has adopted a lower standard. In *Knight v. Thompson*, 723 F.3d 1275, 1286 (11th Cir. 2013), the Eleventh Circuit concluded: "RLUIPA asks only whether efficacious less restrictive measures actually exist, not whether the defendant considered alternatives to its policy." But this interpretation runs counter to the statutory

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[6] *See also Kuperman v. Wrenn*, 645 F.3d 69, 80 (1st Cir. 2011) (prison grooming policy did not violate RLUIPA because "the unrebutted Prison Officials' affidavits show that they considered and rejected alternatives to the shaving regulation"); *Casey v. City of Newport*, 308 F.3d 106, 114 (1st Cir. 2002); *Ind*, 2014 WL 1312457, at *16 n.1 (noting that "[t]hough the Tenth Circuit has never explicitly addressed this point, because of the wide consensus among the other circuits, the Court finds that this requirement [that a state must show it actually considered and rejected other less restrictive alternatives before adopting the challenged policy] is applicable").

The trial court below, however, felt constrained by the Eighth Circuit's prior decision in *Fegans v. Norris*, which had upheld the same ADC's grooming policy. But *Fegans* is distinguishable on its facts. The state in *Fegans* presented evidence that an uncut beard posed a security risk because the plaintiff-prisoner himself had two previous escape attempts and the smuggling of contraband within the prison. 537 F.3d at 907; U.S. Amicus Br. in *Thunderhorse* at 13-14 (describing *Fegans* as upholding a prison policy because "defendants [ ] explained why specific less restrictive alternatives [were] not feasible").

language, which requires the "*least* restrictive means of furthering that compelling governmental interest," 42 U.S.C. § 2000cc-1(a)(2) (emphasis added), and to the great weight of authority.[7]

Consistent with the plain text of the statute, the Department of Justice's interpretation, and the vast majority of the federal circuit courts, this Court should confirm that RLUIPA and its strict scrutiny test require a state to show that it has actually considered and rejected less restrictive alternatives before prohibiting an inmate from exercising an

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[7] Moreover, just six years earlier, in a *per curiam* opinion, the Eleventh Circuit remanded a RLUIPA claim in order for prison officials to present evidence that was not "over ten years old" to support the challenged activity. *See Lanthan v. Thompson*, 251 F. App'x 665, 667 (11th Cir. 2007) (per curiam). And district courts in that circuit have also applied a more robust standard. *See, e.g.*, *United States v. Sec'y, Fla. Dep't of Corr.*, No. 12-cv-22958, 2013 WL 6697786, at *14 (S.D. Fla. Dec. 6, 2013) ("Defendants' rationale for this provision is 'mere speculation,' which RLUIPA proscribes. There is no evidence that Defendants have considered [ ] less restrictive alternative[s]") (citations omitted); *Benning v. Georgia*, 864 F. Supp. 2d 1358, 1366 (M.D. Ga. 2012) ("A number of circuit courts have determined that the government must demonstrate that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice. [T]he mere assertion of security or health reasons is not, by itself, enough for the Government to satisfy the compelling governmental interest requirement.") (quotation marks and citations omitted).

aspect of his religious beliefs. The state must substantively review the alternatives; "consideration and rejection" of alternative means cannot be merely *pro forma*. *See Warsoldier*, 418 F.3d at 996 (state cannot meet its burden unless "it demonstrates that it has *actually* considered and rejected *the efficacy* of less restrictive measures before adopting the challenged practice") (emphases added) (citations omitted); *see also Spratt*, 482 F.3d at 41 (same); *Shilling v. Crawford*, 536 F. Supp. 2d 1227, 1233 (D. Nev. 2008) ("conclusory affidavits that do not affirmatively show personal knowledge of specific facts" and generalized assertions "that a practice is the least restrictive" are insufficient) (internal quotation marks and citations omitted).

The State did not satisfy the essential "least restrictive alternatives" test here. During the evidentiary hearing, the court asked: "[I]t appears that [California] ha[s] a grooming policy and then the Ninth Circuit allowed this beard, half inch beard, have you had any sort of correspondence, any training, or anything based on that, that the California officials have mentioned anything or come and spoken at any conference or anything, have they talked about what the impact has been in their prison system?" JA 110-11. In response, Warden Lay responded: *"I haven't had an opportunity to visit with anyone about that. As a matter of fact, I wasn't aware of that case until this came up."* JA 111 (emphasis added).

Indeed, the State did not consider the experience of more than *forty* prison systems have grooming policies without express restrictions on beards, or have provisions for religions exceptions.[8] Dawinder S. Sidhu, *Religious Freedom and Inmate Grooming Standards*, 66 U. Miami L. Rev. 923, 964-70 App. B (2012); Brief for the United States in Supp. of Appellee at 19-20, *Garner v. Kennedy*, 713 F.3d 237 (5th Cir. 2013) ("The Federal Bureau of Prisons, and more than 40 out of the 50 States, allow their inmates to wear trim beards ") (citations omitted). For example, the Federal Bureau of Prisons, which is the nation's largest prison system with over 200,000 inmates, provides: "An inmate may wear a mustache or beard or both. The Warden shall require an inmate with a beard to wear a beard covering when working in food service or where a beard could result in increased likelihood of work injury." 28 C.F.R. § 551.2.

There is no evidence that these prison systems have more security incidents than Arkansas because

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[8] Only 10 jurisdictions (Alabama, Arkansas, Florida, Georgia, Idaho, Louisiana, Mississippi, South Carolina, Texas, and Virginia) have prison policies with explicit grooming policies and without religious exceptions. Sidhu, *supra*, at 970-72 App. B; Ind. Dep't of Correction, Policy & Admin. Proc. 02-01-104(X). Within these 10 jurisdictions, courts have found several of these grooming policies did not meet strict scrutiny under RLUIPA. *See, e.g.*, *Garner*, 713 F.3d 237 (Texas); *Couch*, 679 F.3d 197 (Virginia).

of the differences in grooming policies. *See, e.g.*, *Garner*, 713 F.3d at 247 ("We [ ] find it persuasive that prison systems that are comparable in size to Texas's -- California and the Federal Bureau of Prisons -- allow their inmates to grow beards, and there is no evidence of any specific incidents affecting prison safety in those systems due to beards.").

Indeed, the purported security concerns relied upon by the State were purely illusory. Warden Lay testified:

> Q [Petitioner]. Have you -- has there been a whole lot of escapes from the Department of Correction because people were wearing beards?
>
> A [Warden Lay]. Not as of recent years, thank goodness. I do recall one back in the 70s or 80s where the individual grew a beard and blended in with homeless people in Houston, Texas, and I think two or three years before they captured him, and that was to alter his appearance. *Of course, that went the other way around, I think he left the ADC clean shaven and grew the beard after he got out, and he was eventually apprehended*, but.

> Q. So if -- somebody could escape from Cummins then and get out and alter their appearance by growing a beard, right?
>
> A. Oh, certainly, if we don't apprehend them before they have time to do that.

JA104-05 (emphasis added). The one example Warden Lay was able to provide -- that a *clean-shaven* inmate escaped and later grew a beard -- does nothing to support the ADC no-beard policy.

ADC's own grooming policy permits a quarter-inch beard for medical conditions. The prison officials did not provide any concrete examples how permitting a half-inch beard on account of religious beliefs (versus a quarter-inch beard for medical reasons) would lead to greater security concerns. Rather, Director Harris testified:

> Q [Petitioner]. [H]ow then is a quarter inch beard for dermatological reasons not a security threat given -- again, given that it's been stated that people can grow different -- a half inch beard can be one way on one person, different on another, where a quarter inch beard would be the same way, explain to me how that is not a

security threat, but a half inch beard is?

A [Director Harris]. A half inch is longer than a quarter inch.

Q. [I]f your policy is to stop the moving of contraband and weapons in the facility, and your main objection is that the facial hair is the conduit to do so, to move it around the facility or whatever, then explain to me how a quarter inch beard is going to be any different than a half inch beard.

A. The last time I probably walked one of my institutions was before the holidays. The quarter inch beards, you know, primarily, you can still see the skin.

Q. And you're saying a half inch beard, you wouldn't be able to do that?

A. I don't think so, no.

Q. [A] quarter inch beard, someone growing -- one person growing a quarter inch beard might grow it thicker than somebody else, where you can see the skin on him, but you can't see it on the other person. Would that

A. I suppose that's possible, sure.

Q. So they could hide contraband in that, too, right?

A. That's a possibility.

JA 124-25. *Compare Couch*, 679 F.3d at 204 (prison grooming policy did not meet strict scrutiny because state did not explain why it permitted medical exemptions but not religious exemptions for beards).

The State failed to consider whether its security concerns could be addressed by less restrictive alternatives than a flat-out prohibition of beards. It failed to evaluate the experience of more than 40 other jurisdictions that have permitted beards without incident. It further failed to consider the absence of any real-world security concerns it had experienced with beards. The State's superficial justification fails altogether to demonstrate that it's beard prohibition is the "least restrictive means of furthering th[e] compelling governmental interest" in prison security. 42 U.S.C. § 2000cc-1(a)(2).

CONCLUSION

For the reasons set forth above, the decision below should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-6827

IN THE

Supreme Court of the United States

GREGORY HOUSTON HOLT
A/K/A ABDUL MAALIK MUHAMMAD,
Petitioner,

v.

RAY HOBBS, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* THE SIKH COALITION AND MUSLIM PUBLIC AFFAIRS COUNCIL IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Sikh Coalition and Muslim Public Affairs Council share a profound interest in how prison officials accommodate inmates' exercise of religious practices under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), Pub. L. No. 106-274, 114 Stat. 803 (2012) (codified at 42 U.S.C. § 2000cc to 2000cc-5). Sikhs are religiously mandated to maintain uncut hair and unshorn beards. Some Muslims also grow beards as part of their religious practice. Members of both groups have endured substantial discrimination and persecution because of their beliefs and, more to the point, because of the garb and grooming habits associated with their beliefs. *Amici* are thus deeply troubled when an inmate's ability to grow a beard in accord with his faith's teachings is threatened.

The Sikh Coalition was founded in the wake of the September 11th attacks to counter misconceptions, promote cultural understanding, and advocate for the civil liberties of all people, especially Sikhs. All initiated Sikhs are religiously mandated to wear turbans and maintain uncut hair, including unshorn beards, or *kesh*, lest they be deemed apostates. See 2 *The Encyclopaedia of Sikhism* 466 (Harbans Singh ed., 2d ed. 2001) ("My Sikh shall not use the razor. For him the use of razor or shaving the chin shall be as sinful as incest."). *Kesh* must be honored at all

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution intended to fund the preparation and submission of this brief. Pursuant to Rule 37.3(a), the parties in this case have granted blanket consent to the filing of *amicus curiae* briefs.

times and places, even in prison. The right of Sikhs to wear turbans and maintain *kesh*—whether in the military, the workplace, or the prison—is central to the Sikh Coalition's cause.

The Muslim Public Affairs Council ("MPAC") has worked diligently since 1986 to foster a vibrant Muslim American identity and to represent the interests of Muslim Americans to decision makers in government agencies, media outlets, interfaith circles, and policy institutions. Some Muslims interpret the Qu'ran and the Sunnah to command them to wear a beard. See *Fraternal Order of Police Newark Lodge No. 12* v. *City of Newark*, 170 F.3d 359, 360 (3d Cir. 1999) (Alito, J). For such practitioners of Islam, "[t]he refusal by a Sunni Muslim male who can grow a beard, to wear one is a major sin. This is not a discretionary instruction; it is a commandment." *Ibid.* Protecting the rights of Muslim Americans to adhere to this religious commandment is at the core of MPAC's mission.

To accomplish their respective aims, the Sikh Coalition and MPAC regularly file *amicus curiae* briefs in cases that raise issues of vital concern to their respective communities. *Amici*'s missions include protecting the religious exercise of many of the more than 2 million persons incarcerated in the United States at the moment. The majority of these prisoners reside in state prisons and jails, and thus, will be directly affected by this Court's holding here.

Amici maintain that the Eighth Circuit incorrectly rubber-stamped a prison's justifications for cutting an inmate's religiously mandated beard against his will. Such unchecked deference cannot be reconciled with this Court's strict-scrutiny jurisprudence. Nor does it adequately respect or protect the many stripes of sincere religious practice exercised by incarcerated

persons. To the contrary, it cultivates ignorance and inadequately prevents discrimination against unfamiliar religious practices. *Amici* thus urge the Court to side with the majority of courts in holding that, to effectively guard against arbitrary and fear-based decisions, RLUIPA's "least restrictive means" test requires evaluating how other prisons have accommodated the religious practice at issue.

INTRODUCTION AND SUMMARY OF ARGUMENT

For those inmates who belong to a religious minority, the Eighth Circuit's unprecedented "least restrictive means" test for RLUIPA claims is not only wrong but also perpetuates long-standing harms.

RLUIPA prohibits the imposition of "a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden furthers "a compelling governmental interest" by "the least restrictive means." 42 U.S.C. § 2000cc-1(a). This "protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion." *Cutter* v. *Wilkinson*, 544 U.S. 709, 721 (2005); see also *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972) ("[When faced with] legitimate claims to the free exercise of religion. however strong the State's interest , it is by no means absolute to the exclusion or subordination of all other interests."); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1488-1500 (1990).

Once a prisoner shows that a particular policy substantially burdens the exercise of his religion, see 42 U.S.C. § 2000cc-2(b), the prison must "demonstrate[]"

that its policy furthers a compelling governmental interest by the least restrictive means. See *id.* §§ 2000cc-2(b), 2000cc-5(2).[2] Under the least restrictive means standard, the prison must "demonstrate that no alternative forms of regulation would [accomplish the governmental interest] without infringing First Amendment rights." *Sherbert* v. *Verner*, 374 U.S. 398, 407 (1963); see *Ashcroft* v. *ACLU*, 542 U.S. 656, 666 (2004) (least restrictive means test in free speech context requires court to compare challenged regulation to available, effective alternatives).

The Arkansas prison officials' policy—and the Eighth Circuit's endorsement of their approach—does not meet this standard.

I. Wearing beards (and unshorn beards for Sikhs) is a central religious exercise for Sikhs and many Muslims, along with certain other grooming practices. All observant Sikhs must have uncut hair and unshorn beards, or *kesh*. See 2 *The Encyclopaedia of Sikhism*, *supra*, at 466 ("[T]he use of razor or shaving [or trimming] the chin shall be as sinful as incest."). In fact, many Sikhs have chosen to die rather than cut their hair. The forcible cutting of hair—whether on the head or the face—strips a Sikh of his faith identity and is among the gravest injuries he could suffer. Therefore, forcing a Sikh to cut his hair substantially burdens his free exercise of religion.

Many Muslims believe that the Qu'ran commands them to wear a beard. See *Fraternal Order of Police*, 170 F.3d at 360 (Alito, J.) (noting that "[t]he refusal by a Sunni Muslim male who can grow a beard, to wear one is a major sin."). Policies restricting a right

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[2] While RLUIPA does not define the phrase "least restrictive means," other First Amendment case law provides a definition.

to grow a beard thus substantially burden the religious exercise of many followers of the Islamic faith.

II.A. *Amici* concede that Respondents have compelling interests both in ensuring prison security and in advancing concerns for the hygiene of those who are incarcerated. The Eighth Circuit's holding, however, does not require prisons to advance those interests using the least restrictive means available. To the contrary, by deferring entirely to the testimony of prison officials and discounting whether other penal institutions have accommodated the practice at issue—*i.e.* whether inmates safely maintain half-inch beards elsewhere—the Eighth Circuit's approach eviscerates the least restrictive means standard that Congress expressly set forth RLUIPA. This alone merits reversal.

But *amici* emphasize that the Eighth Circuit's approach also works an especial harm against members of religious minorities in America who have suffered particular indignities and misunderstanding in daily life. Sikhs and Muslims have religious faiths whose tenets are less familiar to most American prison officials than are the tenets of Christianity, Judaism, and other religions more widely practiced in America. In addition, after the terrorism attacks of 9/11, Sikhs and Muslims have been disproportionately subjected to discrimination, persecution, and hate crimes borne out of documented misunderstanding of and hostility toward their faiths.

In most prisons, unfamiliarity and bias are counterbalanced by the efforts of prison officials to "actually consider[] and reject[] the efficacy of less restrictive measures before adopting the challenged practice." *Warsoldier* v. *Woodford*, 418 F.3d 989, 999 (9th Cir. 2005). Yet, despite the risk that individual

prison officials may have limited-to-no exposure to minority faiths, those faiths' grooming rules, or ways of accommodating them, prison officials in the Eighth Circuit hold final authority over an inmate's exercise of his religion, unencumbered by any consideration of whether less restrictive measures have been used elsewhere. In fact, as the court explained below, the "deference owed to [prison officials'] expert judgment" is virtually irrebuttable. J.A. 186-87. Such unchecked deference creates space for prejudice and discrimination; allows for bias, ignorance, and fear to dictate prison policies; and leaves inmates who practice nonmainstream religions bereft of the legal protection Congress guaranteed to them when it passed RLUIPA. This approach is contrary to RLUIPA's purpose in all instances, but it is especially troubling for Sikh and Muslim inmates, who not only must familiarize officials with the tenets of their faiths, but also must combat existing misunderstanding of and hostility toward their systems of religious belief. The ruling below should therefore be reversed.

II.B. As incarcerated Sikhs and Muslims have demonstrated, Arkansas's justifications for its no-beard policy fall short. Had the prison officials evaluated the feasibility of using less restrictive means to advance their legitimate safety concerns—as is required in the majority of circuits—they would have found that many prisoners maintain or grow beards for religious reasons without creating unmanageable safety concerns.

The policies and approach endorsed by the Eighth Circuit inadequately protect religious minorities against the unintentional biases that grow out of unfamiliarity and are an improper interpretation of

RLUIPA. The Eighth Circuit's approach should be reversed.

ARGUMENT

I. THE HAIR GROWTH AND GROOMING BELIEFS OF SIKHS AND MUSLIMS ARE SINCERELY HELD AND, INDEED, CENTRAL TO THEIR RELIGIOUS EXERCISE.

A prisoner seeking RLUIPA's protection must first demonstrate that the challenged prison policy substantially burdens a sincerely held religious belief. See 42 U.S.C. § 2000cc-1(a).[3] It cannot be disputed that a prison grooming policy that would restrict or forbid an inmate from growing his or her hair, where an inmate's religion mandates that such hair be maintained, directly interferes with a cognizable religious exercise and that this conflict represents a "substantial burden" within the meaning of RLUIPA. Cf. *Lyng* v. *Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988).

Many systems of religious belief include among their tenets certain precepts that relate to hair or beard growth. *E.g.*, *Warsoldier*, 418 F.3d at 991-92 ("[The] religious faith [of certain Native Americans] teaches that hair may be cut only upon the death

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[3] "[R]eligious exercise" under RLUIPA is defined broadly to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). The statute leaves open the meaning of a "substantial burden." *See id.* § 2000cc-5 (definitions); 146 Cong. Rec. 16,698, 16,700 (2000) ("[I]t is not the intent of [RLUIPA] to create a new standard for the definition of 'substantial burden' on religious exercise."); 146 Cong. Rec. at 16,700 (joint statement of Sens. Hatch & Kennedy) (noting that "substantial burden" should be interpreted with reference to the Supreme Court's jurisprudence as to "the concept of substantial burden of religious exercise").

of a close relative."); *Benjamin* v. *Coughlin*, 905 F.3d 571, 573 (2d Cir. 1990) ("A fundamental tenet of the religion is that a Rastafarian's hair is not to be combed or cut "); *Leviticus* 19:27 (New Revised Standard Version) ("You shall not round off the hair on your temples or mar the edges of your beard."); Mark Oppenheimer, *Behold the Mighty Beard, a Badge of Piety and Religious Belonging*, N.Y. Times, Aug. 6, 2011, at A12 ("[T]he beard is integral to many men's religious identities, not just religious Jews'. The beard, especially the really big beard, constitutes a look, one that dictates how they are perceived by the world."). For the Sikh and Muslims communities, religious hair grooming mandates occupy an especially central place in their faiths.[4]

A. Sikhism And *Kesh*.

Founded in India's Punjab region in the fifteenth century by Guru Nanak, Sikhism is a monotheistic religion that preaches devotion to God, honest living, and sharing with others. W Owen Cole et al., *A Popular Dictionary of Sikhism: Sikh Religion and Philosophy* 10 (1997). Guru Nanak rejected the caste system and declared all human beings, men and women, to be equal in rights, responsibilities, and

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[4] *Amici* note that protection under RLUIPA does not require a claimant to prove that the exercise at issue is somehow "central" or "fundamental" to or "compelled" by his faith. Rather, Congress directs that courts must protect "*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A) (emphasis added). Even if others of the same faith may consider the exercise at issue unnecessary or less valuable than the claimant, and even if some may find it illogical, that does not take it outside the law's protection. *See* Steven C. Seeger, *Restoring Rights to Rites: The Religious Motivation Test and the Religious Freedom Restoration Act*, 95 Mich. L. Rev. 1472, 1503-04 (1997)

their ability to reach God. He taught that God is universal to all—regardless of religion, nation, race, color, or gender. Nine Sikh gurus succeeded Guru Nanak and further developed this system of religious belief. The collective wisdom of all ten Sikh gurus lives eternally in the form of a holy book: the Guru Granth Sahib. *Id.* at 1, 5.

Central to Sikhism is the requirement that adherents maintain *kesh*—uncut hair on all parts of the body. See Patwant Singh, *The Sikhs* 56 (1999). The particular requirement that Sikhs must maintain *kesh* has been taught since the time of Guru Nanak, who called it "God's divine Will." Opinderjit Kaur Takhar, *Sikh Identity: An Exploration of Groups Among Sikhs* 30 (2005). The Sikh holy book confirms that "on each and every hair, the Lord abides." *The Guru Granth Sahib* 344. Sikhs therefore must keep their hair long.

Sikhs who fail to maintain *kesh* confront grave consequences. "Trimming or shaving is forbidden [for] Sikhs and constitutes for them the direst apostasy." 2 *The Encyclopaedia of Sikhism*, *supra*. The unique Sikh philosophy of hair, which has both spiritual and physical dimensions, explains this principle. *First*, Sikhism teaches that God put meticulous thought into crafting mankind. *Ibid.* Specifically, "He gave men beard, moustaches, and hair on the head." *Ibid.* Sikhs live in harmony with God by leaving all hair unshorn on their bodies. *Second*, *kesh* is central to Sikh identity—the gurus and their followers have maintained *kesh* since the religion's founding in the fifteenth century. *Ibid.* In the eighteenth century, Sikhs in South Asia were persecuted by the Mughal Empire. *Ibid.* They were humiliated and pressured to abandon their faith, often by having their turbans torn and their hair forcibly cut. *Ibid.* In resistance to

these forced conversions, many Sikhs chose death instead—thus solidifying the religious significance of *kesh*. *Ibid.*

In fact, the cutting of *kesh* represents one of just four "cardinal prohibitions" in the religion. These prohibitions state in no uncertain terms that practicing Sikhs (1) must not commit adultery, (2) must not use tobacco, (3) must not eat meat that has been ritually prepared (*e.g.*, kosher or halal), and (4) must not have their *kesh* cut. W.H. McLeod, *The A to Z of Sikhism* 119 (2005).

Surely no prison would force a Sikh inmate to violate the first three of these norms. The fourth should be no different. In the historical and spiritual context of Sikhism, the cutting of any hair on the human body constitutes the most humiliating and hurtful physical injury that can be inflicted upon a believer. To do so would substantially burden his exercise of his faith.

B. Islam And The Commandment To Wear A Beard.

In accord with longstanding teachings of Islamic jurisprudence, a distinct subset of Muslims wear beards. For these Muslims, this is a vitally important expression of their faith. As then-Judge Alito explained, for example, "[t]he refusal by a Sunni Muslim male who can grow a beard, to wear one is a major sin. [T]he non-wearing of a beard by the male who can, for any reason is as serious a sin as eating pork." *Fraternal Order of Police*, 170 F.3d at 360-61 (alteration omitted).

Because there is a wide variety of religious practice within the broader Islamic faith—based, in part, on the rich diversity of teachings passed down through Islamic oral traditions—it is difficult to generalize

about particular practices exercised by all Muslims. But broadly speaking, Sunni Muslims, like petitioner, typically follow the teaching of one of four *madhhabs* (commonly known as "schools of jurisprudence" or "schools of thought")—the *Hanafi*, *Hanbali*, *Maliki*, or the *Shafi'i*. Wael B. Hallaq, *An Introduction to Islamic Law* 2 (2009) These schools, which date back the eighth century, adhere to interpretations of the Qur'an and early Islamic traditions formulated by each madhhab's founding *Imam* (leader).

Although these madhhabs differ subtly on certain issues of Islamic law, they are unanimous in their views on growing a beard. For example, Imam Abu Hanifa (the eponymous founder of the Hanafi school) held that that to shorten the beard less than a fist length is *haraam* (strictly forbidden), and suggested that his followers hold their beards in their fists and shave off only the excess. See 5 *Fathul Qadeer, Shaami, Fataawa Mahmoodiyyah* 93, 105, 108; see also *The Translation of the Meanings of Sahih Al-Bukhari* ¶ 5893 (Muhammad Muhsin Khan trans., Darussalam Pubs. 1997); ("Allah's Messenger said, "Cut the moustaches short and leave the beard (as it is)."). Others have expanded on this precept, explaining that "[t]he Prophet said 'Do the opposite of what [the pagans] do. Grow abundantly the beards and cut the moustaches short.'" *Sahih al-Bukhari*, *supra*, ¶ 5892. Likewise, Imam al-Shafi'i held that, for Shafi'ites, to shave one's beard is *makruh* (discouraged). 1 *al-Majmoo* 290; see *Sahih Muslim* ¶ 501 (Abdul Hamid Siddiqi trans., Sh.Muhammad Ashraf 1971) ("Abu Huraira reported: The Messenger of Allah (may peace be upon him) said: Trim closely the moustache, and grow beard, and thus act against the fire-worshippers."). Imam Malik, too, explained that "[t]o shave the beard is without doubt haraam

according to all Imams." 7 *al-Muntaqa min Akhbar al-Asmai* 266. And Imam Ahmad ibn Hanbal prescribed that "[t]o grow the beard is essential and to shave it is haraam." 1 *al-Mustaw'ib* 260; 1 *Kitabul Furoo* 130.

Even today, more than twelve centuries later, while there are some divisions about the particulars of the issue, mainstream Islamic scholars still consider wearing a beard to be a core religious obligation. See Oppenheimer, *supra*, at A12 ("[A]ll over the Muslim world, the full beard has come to connote piety and spiritual fervor."). For those who follow this tradition strictly, "[t]his is not a discretionary instruction; it is a commandment. A male will not be saved from this major sin because of an instruction of another, even an employer to shave his beard and the penalties will be meted out by Allah." *Fraternal Order of Police*, 170 F.3d at 360-61. Accordingly, rather than cut their beards, adherents of these schools have long endured persecution in the form of job-related sanctions and prison discipline. See *id.* at 360 (enjoining police department from disciplining two Islamic officers who had refused to shave their beards for religious reasons); see also *Garner* v. *Kennedy*, 713 F.3d 237, 247 (5th Cir. 2013) (upholding Muslim prisoner's right to wear a beard and enjoining prison from further disciplining him for doing so); *EEOC* v. *United Parcel Serv., Inc.*, 587 F.3d 136, 137-38 (2d Cir. 2009) (per curiam) (recounting parcel service's discharge of Muslim employees based on no-beard policy); Anuj Gupta, *Islamic Group Says Bias Rising in U.S.; Discrimination: Annual Report Says that Complaints of Prejudice Were Up 15% Last Year. Most Involved Curbs on Religious Practices*, L.A. Times, Aug. 23, 2001, at A9 ("Among the most common complaints received are instances in

which Muslim women are not allowed to wear their traditional hijab scarves on their heads in the workplace or men are asked to shave their beards."); Bruce Lambert, *Muslim Officer Suspended Over Goatee*, N.Y. Times, July 4, 1999, *available at* http://goo.gl/jJ1X2E (detailing New York State Park Police officer's suspension for growing a beard "to comply with Muslim teachings"); Sophia Pearson, *Philadelphia Tells Muslim Police to Trim Beards or Lose Jobs*, Bloomberg, Oct. 19, 2005, http://goo.gl/yn694d (detailing plights of Muslim police officer and Muslim firefighter both serving suspensions for refusing to shave their beards).

* * *

In sum, the religious grooming requirements of Sikhs and Muslims —and specifically of petitioner— are sincerely held religious beliefs. Restricting an adherent's ability to abide by them is a substantial burden on his exercise of religion.

II. THE EIGHTH CIRCUIT'S UNCHECKED DEFERENCE TO PRISON OFFICIALS UNJUSTIFIABLY THREATENS MINORITY RELIGIONS.

The Eighth Circuit's deferential view of the "least restrictive means" nullifies RLUIPA and, in the process, unnecessarily and disproportionately harms minority religions

Under RLUIPA, once an inmate demonstrates that his religious exercise is substantially burdened, the prison officials must show that their policies advance a compelling interest using the least restrictive means. See 42 U.S.C. §§ 2000cc-2(b), 2000cc-5(2); *United States* v. *Lee*, 455 U.S. 252, 257-58 (1982) ("The state may justify a limitation on religious liberty by showing that it is essential to accomplish

an overriding governmental interest."); *Yoder*, 406 U.S. at 215 ("[O]nly those interests of the highest order," such as public safety, "can overbalance legitimate claims to the free exercise of religion.").[5] No one disputes that prisons have compelling interests in safety, security, hygiene, and identification; what is contested is what constitutes the "least restrictive means."

Petitioner submitted several less restrictive means that the Arkansas prison officials could employ to maintain a safe prison environment while accommodating his growth of a half-inch beard. Many of these practices have been implemented elsewhere with success. Nonetheless, the Eighth Circuit held that such evidence was entitled to little or no weight, and that the "least restrictive means" test is irrebuttably satisfied by a prison official's self-determination that beards threaten the prison's safety concerns. J.A. 186-87 (construing *Fegans* v. *Norris*, 537 F.3d 897, 903 (8th Cir. 2008)).

At the outset, *amici* stress that the unfettered deference the Eighth Circuit gives to prison officials entirely ignores the "least restrictive means" test. RLUIPA does not require prison officials to refute "every conceivable option." *Hamilton* v. *Schriro*, 74 F.3d 1545, 1556 (8th Cir. 1996) (interpreting least restrictive means prong of Religious Freedom Restoration Act). But where there is evidence that less restrictive alternatives exist, most circuits require prison officials to evaluate the substance of the

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[5] Notably, RLUIPA establishes that protection of religious exercise is itself a compelling governmental interest that should be advanced. *See* 42 U.S.C. § 2000cc-3(g) ("This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.").

requested accommodation and to show that they have "actually considered and rejected the efficacy of" feasible alternatives." *Warsoldier*, 418 F.3d at 999; see, *e.g.*, *Washington* v. *Klem*, 497 F.3d 272, 284 (3d Cir. 2007) (similar); *Murphy* v. *Mo. Dep't of Corr.*, 372 F.3d 979, 988 (8th Cir. 2004) (similar).

The Eighth Circuit, however, puts the burden of persuasion on prisoners, see J.A. 186-87 (requiring plaintiffs to submit "substantial evidence that response of prison officials to security concerns is exaggerated" (construing *Fegans*, 537 F.3d at 903), flipping RLUIPA's allocation of burdens on its head and effectively insulating prison officials' decisions from judicial review. Indeed, RLUIPA requires prisons to "*demonstrate*[]" their interests and the "least restrictive means" of advancing it, not to simply "state" or "articulate" them. 42 U.S.C. § 2000cc-1 (emphasis added). "Demonstrate[]" means to meet the burdens of going forward and of persuasion. *Id.* § 2000cc-5(2); see, *e.g.*, *United States* v. *Wilgus*, 638 F.3d 1274, 1289 (10th Cir. 2011) ("[Courts] have an obligation to ensure that the record supports the conclusion that the government's chosen method of regulation is least restrictive and that none of the proffered alternative schemes would be less restrictive while still satisfactorily advancing the compelling governmental interests." (interpreting RFRA)); *Ashcroft* v. *ACLU*, 542 U.S. at 669 ("The Government's burden is not merely to show that a proposed less restrictive alternative has some flaws; its burden is to show that it is less effective.").

The Eighth Circuit's approach undermines RLUIPA's purpose and leaves its protections hollow. As concerns *amici* especially, this rule also (A) disproportionately harms members of minority religions, such as Sikhs and Muslims; and as *amici*'s experience

with this issue demonstrates, (B) lacks practical merit, as Sikh and Muslim religious grooming practices have been accommodated in many prisons without negative consequence.

A. The Irrebuttable Deference Prison Officials Received Here Makes Sikhs And Muslims Prone To Discrimination And Their Religious Practices Prone To Misunderstanding.

It is difficult enough to square the Eighth Circuit's approach with RLUIPA jurisprudence in general. But its approach especially harms practitioners of minority religions, such as Sikhs and Muslims, whose beliefs are far likelier to be misunderstood by prison officials, and, as a result, to be unfairly burdened.

A central purpose of RLUIPA was the recognition that "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations" were indefensible. 146 Cong. Rec. at 16,699 (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA) (quoting S. Rep. No. 103-111, at 10 (1993)). In *Cutter*, for instance, this Court noted that "'frivolous or arbitrary' barriers [that] impede[] institutionalized persons' religious exercise" frequently arise where a religious practice is outside of mainstream experience, citing state prisons that serve kosher food to Jewish inmates but refuse to serve halal food to Muslim inmates; prisons that refuse to provide sack lunches to Jewish inmates to allow them to break fasts after nightfall; and prisons that refuse to allow Chanukah candles while allowing smoking and votive candles. 544 U.S. at 716 & n.5. RLUIPA's "least restrictive means" test thus ensures an evenhanded application of prison regulations, and guards against the

manifestation of uninformed "speculation" and ignorant "fear."

Sikhs and Muslims have religious practices with which most American prison officials may be unfamiliar—precisely the type of practices this Court recognized RLUIPA was designed to protect. Although the importance of unshorn hair in the Sikh faith and beards in the Muslim faith should lead prisons to acknowledge readily that hair-length regulations pose religious issues for Sikh and Muslim inmates, many prisons lack familiarity with such religious practices. When judicial rules allow prison officials to defend their ignorance by demanding proof from the inmates that their professed anxieties about safety are exaggerated, they perpetuate ignorance of the religious foundation of these practices as well as of the options available to accommodate them. Such a rule threatens Sikhs and Muslims with immeasurable harm to their ability to maintain their religious identity and undermines RLUIPA's purposes.

Unfamiliarity with the practices of Sikh and Muslim inmates likely reflects their small numbers in the United States generally. The first Sikhs moved to America only at the turn of the twentieth century. Juan L. Gonzalez, Jr., *Asian Indian Immigration Patterns: The Origins of the Sikh Community in California*, 20 Int'l Migration Rev. 40, 41 (1986). And today, just 500,000 Sikhs live here, meaning Sikhs constitute a fraction of a percent of the United States population. See S. Con. Res. 74, 107th Cong. (2001). Moreover, the Sikhs who live in the United States are concentrated in a few places, meaning they represent even less of the population—and their religion is even less understood—elsewhere.

Likewise, while the number of Muslims in America has risen in the last 20 years, to 2.6 million, Muslims

still comprise less than 1 percent of the U.S. population. See Pew Research Ctr., *Table: Muslim Population by Country* (Jan. 27, 2011), http://goo.gl/FJQVKS. Moreover, not all of those Americans who identify as "Muslims" adhere to the belief that they—like petitioner—are compelled to wear beards.

These small general populations have translated into similarly small prison populations: only 74 inmates in the federal prison system (or .03%) self-identify as Sikhs, and only 12,106 (or 5.5%) self-identify as Muslim of any type; still fewer are among those who are compelled to wear beards. See Letter from Wanda M. Hunt, Chief FOIA/PA Section, Bureau of Prisons, to Hemant Mehta, Patheos (July 5, 2013), http://goo.gl/1PRcxf. Statistics from state prisons suggest numbers that track the federal prison population. In a recent study, for instance, Sikhs, Baha'is, Rastafarians, practitioners of Santeria, and certain other non-Christian religions together comprise just 1.5% of the prisoner population, suggesting that the Sikh population falls well below 1% in state prisons as well. Pew Research Ctr., *Religion in Prisons: A 50-State Survey of Prison Chaplains* 48 (2012), available at http://goo.gl/gwALJh. Likewise, Muslims of all schools appeared to comprise between 5 and 10% of the state prison population, and those who believe in wearing beards represent a somewhat smaller portion.

These figures indicate that many, if not most, prisons may have little to no experience with the practices and beliefs of Sikhism or petitioner's form of Islamic practice. Consequently, prison officials unfamiliar with such beliefs are less likely to craft their regulations—such as grooming policies—with those practices in mind, creating a higher risk of conflicts between prison policy and religious practice. When such con-

flicts do arise, the Eighth Circuit permits those same officials, who are already unfamiliar with the religion they are burdening, to ignore what other prisons have done to accommodate the burdened practice. This creates creating intolerable room for discrimination.

Ungrounded suspicion, fear, and discrimination of Muslims and Sikhs in this country has been well documented. See Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 Iowa L. Rev. 231, 278 (2012) ("Pejorative news stories suggesting that Muslims in the West were cultural invaders and sought to coercively impose 'Sharia law' further fueled moral panic." (quotation and footnote omitted)); Pew Research Ctr., *Sikh-Americans and Religious Liberty* (Dec. 3, 2009), http://goo.gl/fjJqx3 ("[M]any non-Sikhs find the distinctive appearance [of Sikhs] strange or perhaps even threatening."). Simply by acknowledging their faith in public, whether through the wearing of religious garb, the recitation of prayers, or wearing a beard, Muslims and Sikhs have recently come under intense scrutiny because of unfounded fears of terrorism. See, *e.g.*, Neil MacFarquhar, *U.S. Muslims Say Terror Fears Hamper Their Right to Travel*, N.Y. Times, June 1, 2006, at A1 (reporting on plight of bearded Muslims who are discriminated against when traveling because their appearance evokes fear of terrorism); PolitiCal, *Jerry Brown Signs Law Protecting Sikhs, Muslims, From Workplace Bias*, L.A. Times, Sept. 8, 2012, http://goo.gl/9LmGkl ("'Sikhs and other religious minorities continue to experience job discrimination on account of their religion,'" making necessary a new California law prohibiting discrimination for "wearing turbans, beards and hijabs"); Sikh Coal., *"Go Home Terrorist": A Report on Bullying Against*

Sikh American School Children 4-5 (2014), *available at* http://goo.gl/hWT5hh (finding that the majority of Sikh children experience bullying in schools, in part because "[b]rown skin and turbans have popularly become associated with terror"); *Sikh-Americans and Religious Liberty*, *supra* ("[I]n the wake of the 9/11 terrorist attacks [Sikhs have been] subjected to violence or discrimination because of their appearance."); Pew Research Ctr., *Muslim Americans: No Signs of Growth In Alienation or Support for Extremism* 43-52 (2011) (reporting that nearly half of Muslim Americans had experienced intolerance or discrimination within the previous year). In fact, in 2004, a poll showed that nearly half of Americans believed that, to protect against terrorism, the government should go so far as to affirmatively "'curtail civil liberties for Muslim Americans.'" Sisk & Heise, *supra*, at 281.

In many instances, this prejudice goes beyond mere discrimination, and has, of late, manifested itself in the form of hate crimes and shocking acts of violence. See Lee Romney, *Ever Misunderstood, Sikhs Savor Teaching Moments*, L.A. Times, Nov. 19, 2012, at AA1 ("[A]fter 9/11[] [m]istaken for Muslims because of their turbans, Sikhs were targeted. The Sikh Coalition has since tracked about 700 attacks or bias-related incidents, including the slaying last year of two elderly Elk Grove men who were out for a walk. Then came the Oak Creek shootings in August."); Lee Romney, *Attack on Sikh Men Triggers Outcry in Elk Grove, Calif., and Beyond*, L.A. Times, Apr. 11, 2011, at A1 (reporting, after hate crime murder of two Sikhs, that "Sikhs have often found themselves targets of discrimination They are sometimes mistaken for Hindus or Muslims and heckled for their appearance. A survey found that 10% [of Sikhs]

had experienced hate crimes. The vast majority involved physical attacks, while the rest were vandalism-related."); John Seewer, *Man: Toledo-area Mosque Fire Set as Revenge*, Columbus Dispatch, Dec. 20, 2012 (reporting that the arson of Toledo mosque was committed out of the offender's desire for "revenge for the killings of American troops overseas"); Steven Yaccino et al., *Gunman Kills 6 at a Sikh Temple Near Milwaukee*, N.Y. Times, Aug. 6, 2012, at A1 ("Though violence against Sikhs in Wisconsin was unheard of before the shooting, many sensed a rise in antipathy since the attacks on Sept. 11 and suspected it was because people mistake them for Muslims"); see also Fed. Bureau of Investigation, *2012 Hate Crime Statistics: Incidents and Offenses*, http://goo.gl/UKcsWo (last viewed May 28, 2014) (noting that Muslims are the second-most-targeted victim of religion-related hate crimes); S. Poverty Law Ctr., *FBI: Bias Crimes Against Muslims Remain at High Levels* (2013), http://goo.gl/Hc0gNr (reporting that "the real number of anti-Muslim hate crimes during 2011 may have been somewhere between 3,000 and 5,000," due to "intensification of anti-Muslim rhetoric").

Such an atmosphere of hostility, violence, and mistrust puts the Muslim and Sikh inmate communities at particular risk of being prejudiced by bias-driven regulations or restrictions that superficially appear, or are subjectively believed by those who enforce them, to be neutral. Overt discrimination is both illegal and socially unacceptable, so even those who harbor prejudicial beliefs are unlikely to declare them as such. R. Randall Rainey, *Law and Religion: Is Reconciliation Still Possible?*, 27 Loy. L.A. L. Rev. 147, 186 (1993) ("anti-religious bigotry is largely hidden, and will not readily be admitted"). And there is no record

of intended harm in the record here. But scholars have shown that prejudice often comes out in less obvious and often unintentional ways. See Seymour Epstein, *Cognitive-Experiential Self Theory of Personality, in* 5 *Handbook of Psychology: Personality and Social Psychology* 159, 160-61 (Theodore Millon et al. eds., 2003) (describing the unconscious side of cognition as "emotionally driven," and explaining that the unconscious system "adapts by learning from experience rather than by logical inference," and is particularly impacted by traumatic or emotional events such as the attacks of September 11).

These sorts of hidden or unconscious "[s]tereotypes,"—*e.g.*, that "Muslims [are] security risks and Islam [i]s a religion of violence"—"are especially likely to be activated in contexts that already breed negative stereotypes, such as claims by prisoners." Sisk & Heise, *supra*, at 262, 283. When such subconscious prejudice does manifest itself, it is doubly damaging, insofar as it both cultivates unintentionally discriminatory policies in the first place and then clouds subsequent decisionmaking about accommodations. See *id.* at 262, 283. Indeed, as substantial research has borne out, imprisoned "Muslims appear to be at a pronounced disadvantage in obtaining accommodations for religious practices in federal court [precisely] *because* they are Muslims." *Id.* at 262; see also William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. Chi. L. Rev. 308, 311 (1991) (arguing that a "court is more likely to find against a claimant on definitional grounds when the religion is bizarre, relative to the cultural norm, and is more likely to find that a religious belief is insincere when the belief in question is, by cultural norms, incredulous."). This consequence also holds true for Sikhs, who in addition to being a minority religion in their

own right, are frequently targeted because of their perceived resemblance to members of Al-Qaeda or the Taliban. See, *e.g.*, Yaccino, *supra* (quoting witnesses, in the aftermath of a hate crime shooting at a Sikh temple, complaining that "'[m]ost people are so ignorant they don't know the difference between religions . they see the turban [and] they think you're Taliban'").

A rule in accordance with the approach of the majority of circuits—which requires prison officials who may lack exposure to some faiths to inquire about how uncommon religious practices might safely be accommodated—would protect against such manifestations of ignorance, bias, and limited experience. The Eighth Circuit's rule plainly does not. Its interpretation of RLUIPA should therefore be reversed.

B. Multiple Other Penal Institutions Have Successfully Accommodated Religious Grooming Practices Similar To Petitioner's Without Undermining The State's Security Interests.

The Eighth Circuit's holding is all the more remarkable because the "least restrictive means" test is, in these circumstances, so simple to apply. No groundbreaking research or hypothetical alternatives needed to be conjured. All the Court had to ask the Arkansas prison officials to do was examine whether other prisons have been successfully able to accommodate similar practices. Had they done so, they would readily have found numerous examples of prisoners' religious grooming habits being successfully accommodated.

Arkansas is a complete outlier. As a rule, 44 state and federal prison systems permit at least half-inch beards for prisoners with religious motivation, and

the level of enforcement in the remaining states varies. See Dawinder S. Sidhu, *Religious Freedom and Inmate Grooming Standards*, 66 U. Miami L. Rev. 923, 964-72 (2012) (noting some qualitative limits for hygiene, identification, or security). Further, many jurisdictions permit prisoners to maintain unshorn beards and uncut hair without any length limits whatsoever, either as a general rule for all prisoners, regardless of justification, see, *e.g.*, 28 C.F.R. § 551.2 ("An inmate [in the federal prison system] may wear a mustache or beard or both."); Alaska Admin. Code tit. 22, § 05.180(c) ("A prisoner must be permitted to adopt any hair style or length, including a beard and mustache if they are kept clean."); Colo. Dep't Of Corr., Administrative Regulation, No. 850-11, § IV.A.3 (2011) (allowing inmates "freedom in personal grooming," including beards that "are kept neat and clean"); N.J. Admin. Code § 10A:14-2.5(a), (b) ("Inmates shall be permitted to have the hair style or length of hair they choose, including beards and mustaches, provided their hair is kept clean and does not present a safety hazard, or a health, sanitary or security problem."); Ohio Admin. Code 5120-9-25(A), (D), (F) (similar); or as an expressly provided exception for religious adherents, see, *e.g.*, Ariz. Dep't Of Corr., Inmate Regulations § 704.02(1.3) (2013) ("Full beards or partial beards shall not be authorized. Exceptions for full beards may only be granted for medical or religious reasons. Authorized beards shall be kept clean, trimmed and well-groomed at all times."); N.M. Corr. Dep't, Inmate Grooming And Hygiene, No. CD-151101 §§ (H)(5), (J)(1), *available at* http://goo.gl/RkOceP ("Beards and goatees are not permitted and no other facial hair is permitted." "Inmates having a sincerely held religious belief which prohibits the inmate from cutting his hair may request an except-

ion to the grooming standards "); N.Y. Dep't Of Corr. Servs., Directive: Inmate Grooming Standards, No. 4914, §§ (III)(A)(2)(b), (A)(5), (B)(1)(b) (2014), *available at* http://goo.gl/vwXALr (similar); Pa. Dep't Of Corr., Policy Statement: Religious Activities, No. DC-ADM 819, § 4(B)(1)(c), (2)(e)-(f), (3) (2013), *available at* http://goo.gl/pYtkBe (similar).

It is difficult to comprehend how a rule that is not followed in nearly four dozen states—all of which have the same compelling interests in prisoner safety, hygiene and security—can, at the same time, be the "*least* restrictive means" of ensuring prisoner safety, hygiene, and security. See *Garner*, 713 F.3d at 247 ("We find it persuasive that prison systems that are comparable in size to Texas's—California and the Federal Bureau of Prisons—allow their inmates to maintain beards, and there is no evidence of any specific incidents affecting prison safety in those systems due to beards."); *Warsoldier*, 418 F.3d at 1000 ("[T]he failure of a defendant to explain why another institution with the same compelling interests was able to accommodate the same religious practices may constitute a failure to establish that the defendant was using the least restrictive means."). Yet the Eighth Circuit would permit the deprivation of a minority inmate's right to exercise his religion based on little more than "the government's bare say-so." *Yellowbear* v. *Lampert*, 741 F.3d 48, 59 (10th Cir. 2014) (Gorsuch, J.) ("RLUIPA's compelling interest test is a strict one: Congress borrowed its language from First Amendment cases applying perhaps the strictest form of judicial scrutiny known to American law. That test can[not] be satisfied by the government's bare say-so." (citing *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 500-01 (1989))).

Amici have repeatedly seen where prisoners who have been allowed to practice their faith through growing their hair and beards have done so without jeopardizing any of the security, hygienic, or identification concerns raised by respondents. In fact, research bears out that permitting religious adherents to practice their faith in prison can lead to *better* security and reduce the likelihood of recidivism. See *Religion in Prisons: A 50-State Survey of Prison Chaplains*, *supra*, at 63 ("73% of the chaplains surveyed consider access to high-quality religion-related programs while in prison absolutely critical to rehabilitation"); Todd Clear et al., *Prisoners, Prison, and Religion: Religion and Adjustment to Prison*, 35 J. Offender Rehab. 152 (2002) (finding a statistically significant inverse relationship between inmates' religiousness and their confinement for disciplinary infractions); Criminal Justice Policy Council, *Initial Process and Outcome Evaluation of the InnerChange Freedom Initiative: The Faith-Based Prison Program in TDCJ* 23 (2003), *available at* http://goo.gl/NPTwyu (finding a far lower rate of recidivism among Texas prisoners who had completed faith-based programs in prison).

One such example is the case of Sukhjinder S. Basra, a Sikh man imprisoned in California. See Sikh Coal., *Legal Victory: Sikh Prisoners Can Maintain Kesh*, (June 10, 2011), http://goo.gl/HKWWCb. Like other Sikhs, Mr. Basra believed firmly in the importance of maintaining a beard. However, at the time he was imprisoned, California's Code of Regulations prohibited inmates from wearing facial hair that extends more than one-half inch in length. See Cal. Code Reg. tit. 15, § 3062(h) (2011). After petitioning California officials, the State agreed that the facial hair length restrictions were not justified

when imposed on Sikh prisoners, and that Mr. Basra's proposed beard would not threaten other prisoners' health or safety. The State thus agreed to permit Mr. Basra to grow his beard and eventually rescinded the regulation. See Settlement Agreement, *Basra* v. *Cate*, No. 2:11-cv-1676 SVW(FMOx) (C.D. Cal. filed June 5, 2011) (Dkt. No. 40-1). After this, Mr. Basra never became a security concern.

Similarly, Paramjit Singh Basra, a Sikh prisoner in Washington State's Clallam Bay Corrections Center, has been permitted to wear a turban and to maintain unshorn hair and beard while incarcerated, and has done so without incident. Sikh Coal., *Guru Granth Sahib Added to Special Handling List by Washington Prison*, http://goo.gl/7yY258 (last visited May 28, 2014) (detailing efforts by Sikh Coalition to afford special status to Sikh holy book on behalf of Mr. Basra who maintains a turban, uncut hair, and an unshorn beard).

Furthermore, under an injunction in force since 2002, more than 300 Muslim prisoners incarcerated at California's Solano state prison have worn half-inch beards in accordance with their faith. See *Mayweathers* v. *Terhune*, 328 F. Supp. 2d 1086, 1090-91, 1096 (E.D. Cal. 2004) (recounting procedural history of case and granting permanent injunction protecting Muslim prisoners' rights to wear beards); Richard Fausset, *Lawsuit May Force Change in Prison Ban on Beards*, L.A. Times, Oct. 7, 2002, sec. 2 (Metro), at 1 ("The 300 Muslims at Solano state prison have been allowed to wear beards since February, when U.S. District Court Judge Lawrence K. Karlton granted a preliminary injunction."); Henry Weinstein, *Court Backs Muslim Inmates*, L.A. Times, Dec. 28, 2002, sec. 2 (Metro), at 1. In the intervening

decade, there have been no reports of any beard-related security or hygiene problems.

These examples demonstrate that other prisons—which all have the same compelling interests and safety concerns held by the Arkansas prison—have accommodated religiously mandated beards without jeopardizing prison security, and that such accommodation promotes rehabilitation. Accordingly, the Arkansas prison's rule and the Eighth Circuit's approval of it are irreconcilable with RLUIPA. The judgment below should be reversed.

CONCLUSION

For the forgoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-6827

In the Supreme Court of the United States

GREGORY HOUSTON HOLT a/k/a
ABDUL MAALIK MUHAMMAD,
Petitioner,

v.

RAY HOBBS, Director, Arkansas
Department of Correction, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF REFORMED PRISONERS JESSE WIESE, NICHOLAS ROBBINS, THOMAS C. COTTON III, ERNST FENELON JR. & SCOTT GREENBERG AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are formerly incarcerated individuals who developed a relationship with God while incarcerated and were able to practice the fundamental tenets of their faith during that time. Although *amici* have divergent beliefs, they agree that the religious freedoms they experienced while incarcerated enabled them to become grounded in a purpose higher than themselves, provided a rehabilitative experience, and prevented them from returning to prison.

Jesse Wiese is a Policy Analyst at Justice Fellowship, an arm of Prison Fellowship Ministries. In 2000, Wiese was sentenced to 15 years imprisonment. During his time in prison, Wiese developed a relationship with Jesus Christ.

Nicholas Robbins is a Reentry Specialist at Pathway to Freedom, a successor to The InnerChange Freedom Initiative, in Arkansas. During a ten-year sentence of imprisonment, Robbins developed a relationship with God and practiced the Christian faith.

Thomas C. Cotton, III, is the Executive Director of Redemption & Advancement Alliance, a non-profit organization he founded post-incarceration to aid reentry of former prisoners into society. Cotton

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[1] The written consents of counsel for both parties have been filed with the Court. No counsel for a party authored this brief in whole or in part, and neither a party nor counsel for a party made any monetary contribution intended to fund the brief's preparation or submission.

previously was sentenced to ten years in prison; during his time there he developed a relationship with Jesus Christ.

Ernst Fenelon is a Program Coordinator at the Prison Education Project. Fenelon previously served over 14 years in prison, during which time he became a devout Muslim and practiced the Islamic faith.

Scott Greenberg presently volunteers at a food bank and teaches computer courses through a Catholic charity. While serving six years in prison on a parole violation, Greenberg reconnected with the practices of his Jewish faith and credits his good conduct post-release to the prison Jewish program.

SUMMARY OF ARGUMENT

This brief tells the stories of five men. Each has served a long prison sentence. Combined, their crimes include armed robberies, drug offenses, sex offenses, aggravated assaults, and more. In prison, these men developed religious beliefs—Christian, Jewish, and Muslim. Through practicing their faiths and observing sacraments—including a Muslim beard and a Jewish yarmulke—these men became what they are today: upstanding members of society. Combined, they have helped hundreds of other current and former prisoners develop faith and rehabilitate their lives.

Sincere development and practice of religion in prison literally helps "convert" violent and dangerous men into upstanding citizens—a process that in modern prisons needs all the help it can get. These five men lived that story, Congress in passing RLUIPA understood it, and so do the forty-four States that would permit the Muslim beard at issue here. This Court should too.

ARGUMENT

I. SINCERELY PRACTICED RELIGION REDUCES RECIVIDISM

1. *Amici's* Lives Demonstrate that the Sincere Observance of Religious Practices is Rehabilitative.

A. Acts and Convictions

Amici are all felons. At the time they committed their crimes, none had a meaningful relationship with God. None practiced a religion.

1. At 21, Jesse Wiese was depressed. Growing up, Wiese was a smart and likeable student in private Christian schools. He was the paradigmatic "good kid" until his parents' marriage fell apart. As his family life fractured, teenager Wiese rebelled. His rebellion began as a quest to find the purpose and meaning of life. He soon developed a nihilistic view and decided to focus on doing whatever he felt. Wiese quickly became hopeless and depressed. Contemplating suicide, he purchased a .38 Smith & Wesson revolver. As he held the gun in his mouth, he decided to spare his father the grief of a bloodied white leather couch. He took the gun, stole a vehicle, and drove over 600 miles away.

Wiese wanted to live as an outcast, away from all family and free from the laws of man. He knew he needed money to live the lifestyle he wanted, and to him, the quickest way to obtain the funds he needed was to rob a bank. On May 5, 1999, Wiese arrived in Walford, Iowa, a small town near his grandmother's home. He chose this town believing it would be easier to rob a bank there. He laid in wait for a bank

employee to open the bank, then held the employee at gun-point, opened the bank vault, duct-taped the employee, and stole some money. Within minutes, a high-speed police chase ensued and he was apprehended. His grandmother learned of his arrest on the local news. Wiese was charged with six felonies and faced up to 75 years in prison; he ultimately pled guilty and received a sentence of 15 years. While Wiese was slightly remorseful, he did not take responsibility for his actions.

2. Nicholas Robbins accepted Christ at six years old. He thought his belief in Christ was all he needed so he did not pay much attention to practicing his religion. He separated his belief in God from the way he lived his life. At 12, he started smoking marijuana and using other drugs. At 16, Robbins was arrested for possession of marijuana.

Once released, Robbins ran away from home and moved in with friends who fostered his drug habits. Soon thereafter, he began to steal to sustain his drug lifestyle and pay his bills. One day Robbins went to cash a check but the store refused to do so because he was underage and lacked proper identification. Robbins was furious. He returned the next day and successfully robbed the store. A month later, he returned to rob the same store again. This time, the staff recognized Robbins and alerted the police. Soon after, Robbins was arrested and charged with the two armed robberies. He received two concurrent ten-year sentences. Robbins was 17 years old at the time and weighed about 135 pounds. He entered prison terrified but determined to be a fighter and make a name for himself.

3. Similarly, at age 15 Thomas Cotton began to sell drugs. Prior to this, Cotton had chosen to live with his father, who was then recovering from a stab wound. Cotton's father never fully recovered and could not provide the fatherly guidance Cotton needed. At 18, Cotton robbed a fast-food restaurant and was arrested but released on bail. Cotton lived in a bad neighborhood where the only successful people he had ever known were drug dealers. Cotton craved that kind of success. During the seven months he was out on bail, Cotton became a professional drug dealer. He was motivated to make enough money to hire a lawyer to defend him on his robbery charge. He eventually received a one-year sentence and served fewer than five months because it was his first conviction.

Within a week of his release, Cotton joined a multi-state drug conspiracy. Soon every member of the conspiracy except Cotton was apprehended. Cotton was on the run from the FBI for five months. On August 6, 1994, with no one else to turn to, Cotton called his estranged mother, who had disowned Cotton over 16 years prior when he was six years old. She told him about her relationship with Jesus and how Cotton could turn to him. Cotton was furious and blamed her for his situation. Two days later, the FBI arrested Cotton and he was charged with multiple drug offenses. He later received a 10-year sentence.

4. Ernst Fenelon Jr.'s father came from Haiti and served this country through the International Rescue Committee ("IRC"), doing tours in Tanzania, Africa and Vietnam. In 1978, when Fenelon was 13 years old, his father was diagnosed with cancer. Fenelon was raised in a Catholic home that instilled the idea that if one

prayed hard enough, the prayers would be answered. But his religious foundation was weakened by a lack of practice and further weakened when he prayed for his father who did not get well. Cancer killed his father and Fenelon turned to alcohol for solace. He then made a series of poor choices, resulting in a violent confrontation with his ex-girlfriend and the police. For multiple felonies, Fenelon received a 28-year sentence and served half of it in a California prison.

5. Scott Greenberg was raised in a middle-class Jewish family in New York, and attended a Yeshiva. After his parents divorced, Greenberg moved to Texas in his teens and developed a habit of stealing and using drugs. Greenberg used and sold marijuana, acids, methamphetamine, and cocaine. Describing his earlier life, Greenberg said, "Al Capone had nothing on me," and noted that the practice of his faith "took a back seat." Eventually Greenberg was convicted of aggravated robbery and committed an assault in prison; he served approximately 20 years. After his release, Greenberg committed a parole violation related to his monitoring device and returned to prison in 2006 for six more years.

B. In-Prison Transformation and Post-Prison Life

1. Looking back, Wiese believes that before he accepted Christ, the outward dejected appearance of prison reflected his inner condition. Following his transfer to a faith-based prison, Wiese encountered and accepted Christ. Accepting Christ gave him a new perspective, purpose, and something to live for—it was a "cognitive and spiritual shift that was more than an emotional experience." He maintained his relationship

with God by regularly participating in Christian community and fellowship, studying his Bible daily and praying. The fellowship and community kept Wiese accountable. The personal Bible studies and prayers transformed him from the inside and Wiese believed he was redeemed—that his prior actions were forgiven and do not dictate his future.

Driven by his newfound faith, Wiese determined to "use every ounce of his being to help other people." He became a mentor to other inmates and helped them develop a relationship with God. Wiese also completed a bachelor's degree while incarcerated, and attended and graduated *magna cum laude* from law school after his release. Wiese is now a Policy Analyst with the Justice Fellowship. It has been about eight years since his release.

Robbins and Cotton, both previously involved with drugs and robberies, had similar transformative experiences. They recall reading their Bibles every morning at 5:00 a.m., participating in Bible studies and devotionals, engaging in weekly Christian fellowship, including attending weekly Friday night revivals.

2. Robbins had made a name for himself fighting other inmates, but when he honestly encountered God, he was humbled to mercy and forgiveness. Robbins believes the Bible was written for him as a prisoner, because numerous individuals in the Bible were prisoners—Joseph, the Israelites, Paul, and most importantly Jesus Christ himself. Robbins applied Christian principles he learned to his daily life and found purpose in answering to a higher power. While incarcerated, he also helped mentor other inmates and led them to develop a relationship with God. Post-

incarceration, Robbins has shared his experience with many, including speaking at the White House. Robbins is now a Reentry Specialist at Pathways to Freedom. He stresses that "faith is what keeps people out [of prison] because there is no amount of punishment that would change the way you live your life." It has been seven years since Robbins' release.

3. Likewise, Cotton encountered God in a moment of silent prayer in prison. That moment of prayer and other Christian practices keep him grounded. Pre-release, Cotton assisted with developing religious-based reentry programs for prisoners. Following his incarceration, Cotton mentored several young men and was called to serve as a Youth Pastor at a large church in California. He has since moved to Atlanta, Georgia, and founded Redemption & Advancement Alliance, an organization geared toward assisting former prisoners with reentry into society. Over 100 former prisoners have completed Cotton's faith-based training program and to date, not one has returned to prison. Cotton notes that he sees his life as a "gift"— "because of my experience, I am able to teach others, and see life from a different perspective. My life is God's story and I get to live it out." It has been 14 years since Cotton's release.

4. A fellow prisoner shared the Qur'an with Fenelon during their incarceration. He studied it for months and initially resisted it because of his Catholic background. After much study and soul searching, he converted to Islam. He freely participated in the five daily prayers, including Jumu'ah (Friday prayer), fasting, wearing a beard, wearing a "Kufi," and observing the religious holidays. While he was

incarcerated in California, a supervisor at the California Medical Facility ("CMF") of the California Department of Corrections issued a memorandum forbidding staff from releasing Muslims for Friday Jumu'ah. Fenelon filed a complaint in the U.S. District Court for the Eastern District of California, which granted him summary judgment on the grounds that the CMF's policy violated the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc *et seq*. *See Fenelon v. Riddle*, No. 2:95-CV-0954 (E.D. Cal. filed Apr. 29, 2003). Fenelon's case led to *Mayweathers v. Terhune*, 328 F Supp. 2d 1086 (E.D. C 2004), a class action in which the U.S. District Court held that California's policy of disciplining prisoners who missed work assignments to attend Friday Jumu'ah violated RLUIPA.

According to Fenelon, "Islam is my rock, my center, my foundation. If I had not been able to fully practice it in the prison environment [I] could have succumbed to all the challenges and pressures inside of prison." Fenelon states that "in challenging the challenges to my faith while incarcerated, I focused on why these practices were important, and it helped my transformation." He says "Islam helped me to transform in my behavior, my thoughts, and my actions."

Following his release, Fenelon has continued in the practice of his faith. He is involved with numerous philanthropic activities and volunteers with several organizations such as Outreach Nation. He works with the Prison Education Project in California, where he provides educational tools to reintegrate prisoners back

into society. He is also married and has a 1½ year-old son. It has been about nine years since his release.

5. Greenberg reconnected with his Jewish faith during his last six-year stretch in prison. Having spent more than half his life incarcerated, Greenberg saw a pilot program for Jewish prisoners as his second chance to practice his faith and be truly transformed. From his first day in the program, Greenberg was permitted to wear his yarmulke and tefillin, and pray with his tallis. He met weekly with a rabbi and ate meals from the facility's kosher kitchen. He was able to spend time studying the Torah and observed all the Jewish holidays. Greenberg spent over four years in the program. While in a pre-release facility, he faced and overcame administrative opposition to his religious practices.

It has now been more than a year since Greenberg's release. Greenberg reports that "this is the first time I was released from prison and did not get high on the same day. Till today, I have not gotten high and I credit it to the time I spent [practicing my faith] in the Jewish program at the Mac facility." He now volunteers, serving at a food bank facilitated by a Christian organization, and he teaches computer courses in a program facilitated by a Catholic charity. He is currently applying to college to obtain a bachelor's degree.

2. Objective Studies and Statistics Support *Amici*'s Experiences

Amici's stories support the Government's own finding that "a growing body of empirical evidence indicate[s] that religious beliefs reduce crime and

recidivism among adult prisoners." U.S. Dep't of Health & Human Servs., Prisoner Reentry, Religion and Reason 4, https://peerta.acf.hhs.gov/pdf/prisoner_reentry.pdf (last visited May 27, 2014) [hereinafter Prisoner Reentry]. The "literature is consistent with . the claim that religious beliefs are inversely related to delinquency, crime and recidivism." *Id.*

In its report, DHHS recounts that individuals who participate in and complete a faith-based prisoner program are "50 percent less likely to be rearrested and 60 percent less likely to be re-incarcerated during a two-year follow-up period." *Id.* Another study found that federal inmates who participated in a religious program had a 40 percent rate of recidivism for up to fourteen years after release, compared to 51 percent for those who did not participate in such programs. Thomas P. O'Connor, Terry L. Brooks, and Michael W. Sprauer, Oregon Dep't of Corrections, *Spirituality, Religion and What Works: Religious Outcomes This Side of Heaven*, 1999,http://www.oregon.gov/doc/OMR/pages/religious _services/rs_article2.aspx (last visited May 27, 2014).

Many scholars also agree that "religious involvement can reduce prisoner misconduct and is a viable correctional intervention." SpearIt, *Religion As Rehabilitation? Reflections on Islam in the Correctional Setting*, 34 Whittier L. Rev. 29, 34 (2012) (citing Todd R. Clear and Melvina T. Sumter, *Prisoners, Prison, and Religion: Religion and Adjustment to Prison*, 35 J. Offender Rehabilitation 127, 146 (2002); Kent R. Kerley et al., *Religiosity, Religious Participation, and Negative Prison Behaviors*, 44 J. for Sci. Study Religion 443, 453 (2005); Thomas P. O'Connor, *What Works,*

Religion as a Correctional Intervention: Part II, 14 J. Community Corrections 4, 4 (2004–05)). For example, with respect to Christianity, "inmates who were most active in Bible studies were significantly less likely to be rearrested during the follow-up period." Prisoner Reentry at 4. Other studies showed that "alcoholic and drug-addicted inmates were able to cope more effectively after converting to Islam" *Religion As Rehabilitation?* at 34 (citing C. Eric Lincoln, The Black Muslims in America 77–78 (3d ed. 1994)).

Religion's emphasis on redemption and rehabilitation is the impetus for the transformation that reduces recidivism. George Walters-Sleyon, *Studies on Religion and Recidivism: Focus on Roxbury, Dorchester, and Mattapan*, 21 Trotter Rev. 1, 43 (2013). "[R]eligion's concept of rehabilitation pursues the revitalization of the inherent worth of the offender as a human being." *Id.* Revitalizing inherent worth establishes the grounds for rationality, individuality, subjectivity and personhood, which are essential elements to restoring an offender, in contrast to solidifying the idea that the offender is beyond redemption. *Id.* at 43–44.

That the sincere observation of religious practices reduces recidivism is thus both anecdotally and empirically true. "[R]eligiously involved inmates, especially those who are involved at a substantial level, seem to have lower rates of recidivism than non-religiously involved inmates." O'Connor, *Spirituality, Religion and What Works*.

II. STATES WITH AN INTEREST IN REDUCING RECIDIVISM SHOULD FOSTER SINCERELY PRACTICED RELIGION

America's first prison was founded in 1790 by the Quakers who envisioned "a true *penitentiary*—a peaceful (if compulsory) sanctum where offenders could study the scriptures, repent, and reenter society as rescued, reformed, and pious citizens." Thomas Cahill, *A Brief History of America's Penal Philosophy*, Public Broad. Serv., Dec. 28, 2007, http://www.pbs.org/moyers/journal/12282007/penalphilosophy.html (last visited May 27, 2014). "[T]he hallmark of determining success in rehabilitation is the recidivism rate, or the rate at which formerly incarcerated individuals return to prison." *Religion As Rehabilitation?* at 32. The current recidivism rate in the American justice system "indicates a massive failure of the penal system to return [previously incarcerated] citizens to society." *Confronting Recidivism: Prisoner Re-entry Programs and a Just Future for All Americans*: Hearing before the Committee on Government Reform, House of Representatives, 119th Cong. 2 (2005) (statement of Representative Mark E. Souder).

Disturbing recidivism statistics have prompted every state and the federal government to express interest in enhancing rehabilitation and reducing recidivism. For example, several states enacted statutes stating a policy of rehabilitation. *See e.g.* Minn. Stat. Ann. § 364.01 (West 2014) ("The legislature declares that it is the policy of the state of Minnesota to encourage and contribute to the rehabilitation of criminal offenders and to assist them in the resumption of the responsibilities of citizenship."). Other states

have allocated substantial resources to studying and enacting recidivism reduction programs. *See, e.g.*, O.R.S. §§182.525 & 182.515 (2014) (requiring that Oregon's Department of Corrections spend "at least 75 percent of state moneys" that it receives on evidence-based programs, such as "a treatment or intervention program that is intended to [r]educe the propensity of a person to commit crimes."). And currently pending before the U.S. Senate is the Recidivism Reduction and Public Safety Act of 2014, S. 1675, 113th Cong. (2014), which attempts "[t]o reduce recidivism and increase public safety, and for other purposes."

Particularly relevant, Arkansas has expressed an interest in reducing recidivism and promoting spirituality. *See* Ark. Act 570, The Public Safety Improvement Act, § 1 (2011) ("The intent of this act is to implement comprehensive measures designed to *reduce recidivism*, hold offenders accountable, and contain correction costs." (emphasis added) (statement of legislative intent not codified)). The Arkansas Department of Corrections expends significant resources in studying and tracking recidivism rates of prisoners in its facilities. *See* Ark. Dep't of Corr., *Reports and Forms*, http://adc.arkansas.gov/resources/Pages/Reports.aspx (last visited May 27, 2014) (listing and providing links to recidivism reports from 2001 to 2010). Further, the Arkansas Department of Corrections' stated mission in part is to "provide opportunities for staff and inmates to improve *spiritually*." Ark. Dep't of Corr., *Goals and Objectives*, http://adc.arkansas.gov/about/Pages/goalsobjectives.aspx (last visited May 27, 2014) (emphasis added).

The sincere development and practice of religious faith in prison helps literally "convert" violent and dangerous men into upstanding citizens—a process that needs all the help it can get. RLUIPA recognizes this, and this Court should as well.

CONCLUSION

Amici respectfully request that this Court reverse the judgment of the Eight Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-6827

IN THE

Supreme Court of the United States

GREGORY HOUSTON HOLT
A/K/A ABDUL MAALIK MUHAMMAD,

Petitioner,

v.

RAY HOBBS, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION, ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* WOMEN'S PRISON ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Women's Prison Association (WPA) is the nation's oldest organization dedicated to helping women and their families navigate the criminal justice system. Founded in 1845, WPA helps women while they are imprisoned and as they reenter society. It also advocates alternatives to incarceration.

Because religion is central to the identity of many female inmates and provides them an unparalleled source of hope, strength, and restoration, WPA is concerned about prison policies that restrict the rights of women to practice their faith. Absent robust legal protection, women in prison face unique threats to their dignity.

The Religious Land Use and Institutionalized Persons Act (RLUIPA) safeguards the religious practices of incarcerated women as well as men. Because this case will likely determine RLUIPA's grooming protections for all inmates, regardless of sex, WPA must add its voice. In particular, WPA supports female inmates whose faith is threatened by the undue deference to prison officials now operating in some circuits.

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[1] Pursuant to Rule 37.6, counsel for *amicus* states that no party's counsel authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel made any monetary contribution intended for the brief's preparation or submission. Letters reflecting the consent of the parties to the filing of the brief have been filed with the clerk.

SUMMARY OF ARGUMENT

Female grooming practices often have profound cultural significance. A woman's hairstyle can reveal her age, class, cultural or ethnic identity, and even her outlook on life itself. Tellingly, women who shave their heads or refuse to cut their hair—whether for reasons of solidarity, mourning, rebellion, or fashion—stand out. A simple choice of hairstyle can mark a woman as traditional, playful, professional, radical, or demure.

Hair has particular importance for women of faith. Many Muslim women, for example, are so committed to honoring God by covering their hair that they feel naked without a headscarf. Similarly, Native American religions teach that hair is a gift from the divine. And Sikh women believe they are forbidden from cutting any hair on their bodies; Sikhs have chosen death rather than cut their hair.

Despite the significance of grooming practices for devout women, prisons can impose strict limitations. These limits may be justified in certain circumstances, but prisons too often rely on speculative or exaggerated concerns to justify unduly restrictive rules.

Congress sought to forbid arbitrary burdens on religious exercise by passing RLUIPA, which requires prisons to show that challenged policies are the *least* restrictive way to further a compelling interest. And although this Court observed in *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005), that "due deference" should be given to prison officials, two circuits effectively ig-

nore the "due" modifier—allowing prisons to do almost anything they want in the name of safety, regardless of whether prisons elsewhere have successfully accommodated the religious practice at issue. This is not what Congress intended.

Female inmates of faith—particularly of minority faiths—face unique harm from such undue deference. Because women are a small percentage of the prison population, and women of minority faiths an even smaller portion, prison officials have limited exposure to their religious practices. As a result, officials' consideration of other states' policies—a key issue in this case—is perhaps more important for devout female inmates than their male counterparts. Prisons that refuse religious accommodations while ignoring successful approaches elsewhere flout RLUIPA's "least restrictive means" test to the detriment of women.

Unless the Eighth and Eleventh Circuit's approach is rejected, prison officials there and elsewhere will be emboldened to deny women the ability to practice their faith in a time of their greatest need. In the humbling environment of prison, religion is a font of identity, community, and healing. It deserves greater weight in prison officials' calculations and should not be brushed aside in ignorance.

ARGUMENT

I. Women In Prison Have A Heightened Need For Religious Accommodation.

A. Past Abuse Leaves Women In Prison Especially Vulnerable.

Women comprise a small but significant portion of the national correctional population. More than 200,000 are incarcerated; one million more are on probation or parole. E. Ann Carson & Daniela Golinelli, U.S. Dep't of Justice, *Prisoners in 2012—Advance Counts* 2 tbl.1 (2013), *available at* http://bit.ly/bjsprisons; Laura M. Maruschak & Thomas P. Bonczar, U.S. Dep't of Justice, *Probation and Parole in the United States, 2012*, at 17 tbl.2, 18 tbl.3, 19 tbl.4, 21 tbl.6 (2014), *available at* http://bit.ly/bjsprobation; Todd D. Minton & Daniela Golinelli, U.S. Dep't of Justice, *Jail Inmates at Midyear 2013—Statistical Tables* 6 tbl.2 (2014), *available at* http://bit.ly/bjsjails. And although women make up only seven percent of the incarcerated population, their numbers grew six-fold between 1980 and 2010. Carson & Golinelli, *supra*, at 2 tbl.1; The Sentencing Project, *Incarcerated Women* 1 (2012), *available at* http://bit.ly/sentencingproject.

Women tend to commit less serious crimes, often motivated more by social pressure than aggression. Only about a third of women incarcerated for over a year were convicted of violent offenses, compared to more than half of similarly situated men. Carson & Golinelli, *supra*, at 11 tbl.10. They are more likely to have been drawn into crime by their social connections, especially their romantic partners. Brent B.

Benda, *Gender Differences in Life-Course Theory of Recidivism: A Survival Analysis*, 49 Int'l J. Offender Therapy & Comp. Criminology 325, 339 (2005). And they are less likely to commit new crimes after serving their time. Fla. Dep't of Corr., *2011 Florida Prison Recidivism Report* 8 (2012), *available at* http://bit.ly/floridadoc. Female inmates are not usually hardened criminals; they typically erred at moments when they were susceptible to negative influences in their lives.

Women's life experiences *before* turning to crime also often make them especially vulnerable in prison. Histories of physical and sexual abuse are nearly ubiquitous. In surveys of incarcerated women, the vast majority attest to having suffered some form of sexual abuse; approximately a third encountered this abuse as children. Cathy McDaniels–Wilson & Judson L. Jeffries, *Women Behind Bars: An Illuminating Portrait*, 2011 J. Inst. Just. Int'l Stud. 129, 134 (2011). Over ninety percent have experienced domestic violence. Sarah Wynn, *Mean Women and Misplaced Priorities: Incarcerated Women in Oklahoma*, 27 Wis. J.L. Gender & Soc'y 281, 287 (2012). And by the time they enter prison, more than seventy percent suffer from mental illness. Doris J. James & Lauren E. Glaze, U.S. Dep't of Justice, *Mental Health Problems of Prison and Jail Inmates* 4 (2006), *available at* http://bit.ly/bjsmentalhealth. Male prisoners do not suffer from such prevalent abuse or mental illness. *Id.*; Zina T. McGee et al., *From the Inside: Patterns of Coping and Adjustment Among Women in Prison*, *in It's a Crime: Women & Justice* 507, 511 (Roslyn Muraskin ed., 4th ed. 2007).

Once in prison, women are watched in their most intimate moments by guards who are predominantly male. Kim Shayo Buchanan, *Beyond Modesty: Privacy in Prison and the Risk of Sexual Abuse*, 88 Marq. L. Rev. 751, 753 (2005) (seventy percent of women's prison guards are men). Guards watch the inmates as they change clothes, shower, use the toilet, and receive medical treatment. Samiera Saliba, *Rape by the System: The Existence and Effects of Sexual Abuse of Women in United States Prisons*, 10 Hastings Race & Poverty L.J. 293, 296 (2013). They often refer to the women with gender-based slurs like "bitch" and "whore." *Id.* at 297. The overall effect is "a general atmosphere of fear, male domination, and submission," *id.*, especially for women with histories of sexual abuse, Buchanan, *supra*, at 754–55.

B. When Barred From Honoring Religious Grooming Customs, Devout Women Lose A Critical Source Of Strength.

For such a vulnerable population trapped in a degrading environment, religion is powerful: it affords dignity, modesty, and personal identity. This is especially true for women, who tend to be more religious than men and enter prison with stronger religious ties. Moira De Nike, *The Penitent: The Myths and Realities of Religious Rehabilitation Among California Prisoners* 167 (May 2005) (unpublished Ph.D. dissertation, University of Hawaii at Manoa), *available at* http://bit.ly/mdenike. Their commitment to religion can serve as a link to the outside world and engender a sense of perspective that makes prison life bearable.

It is a marker of humanity in an otherwise dehumanizing environment. *Id.* at 190.

But prison policies can limit women's religious practice. Religious traditions such as covering hair or dressing modestly, for example, often conflict with one-size-fits-all prison policies. Even in secular society, hair matters: from the sexual objectification of blondness to the radical power of short hair, a woman's hair, for better or for worse, says something about who she is. Rose Weitz, *Rapunzel's Daughters: What Women's Hair Tells Us About Women's Lives*, at xii–xv (2004). For the devout, this statement is more than a stylistic preference: it is a declaration of devotion to God. Conflicts between prison regulations and religious commandments cause problems for female inmates of many faiths.

Many Sikh and Native American women keep their hair long as a religious commandment. For Sikhs, unshorn hair is one of the five central obligations of the faith. The Sikh Coalition, *FAQ*, http://bit.ly/sikhcoalition (last visited May 14, 2014). Similarly, Native American religions teach that hair is a gift from a higher power that should be cut only to mark solemn events like the death of a relative. *Iron Eyes v. Henry*, 907 F.2d 810, 811 (8th Cir. 1990).

Likewise, headscarves play an important role in Muslim and Orthodox Jewish religious identity. Rhys H. Williams & Gira Vashi, *Hijab and American Muslim Women: Creating the Space for Autonomous Selves*, 68 Soc. Religion 269, 281 (2007); Valeria Seigelshifer & Tova Hartman, *From Tichels to Hair Bands: Modern Orthodox Women and the Practice of Hair Covering*, 34 Women's Stud. Int'l F. 349, 351

(2011). Many Muslim women believe they have a religious obligation to cover the hair and neck. Williams & Vashi, *supra*, at 281–82. And many Orthodox Jewish women also cover their hair, both as a form of modesty and as a public marker of marriage status akin to a wedding band. Seigelshifer & Hartman, *supra*, at 351.

When prisons limit women's ability to follow the dictates of their faiths, devout women are forced to violate their most sincere religious beliefs—a deeply traumatic experience. Jameelah Medina's story is typical. Ms. Medina, a Muslim woman, was arrested in California for riding a train without a valid pass. After being taken to a detention center, she was forced to remove her hijab. Jameelah Medina, *My Hijab, My Right, in ACLU Women's Rights Project 2008 Report* 89, 89 (Aliya Hana Hussain & Lenora M. Lapidus eds., 2009), *available at* http://bit.ly/womensrights project. She vividly describes the humiliation she felt during this experience, analogizing it to how a non-Muslim woman would feel naked in public: "[f]or me, wearing clothes without my hijab is just as meaningless as wearing a hijab without any clothes on—either way, I feel exposed." *Id.* Without the ability to wear a headscarf, Ms. Medina felt she was no longer "the gatekeeper of [her] own body." *Id.* "I did not want to be sensualized and eroticized," she said. "I just wanted to be human." *Id.*

Elizabeth Zargary, an Orthodox Jew, endured a similar trauma in New York. *Zargary v. City of New York*, 607 F. Supp. 2d 609, 611–12 (S.D.N.Y. 2009), *aff'd*, 412 F App'x 339 (2d Cir. 2011). During the

prison intake process, Ms. Zargary was ordered to remove her headscarf for photographs. *Id.* After four hours of prison guards' pressuring her to remove her scarf, she asked to speak with a rabbi. *Id.* This request was denied, and a male guard forcibly removed her scarf. *Id.* Traumatized, Ms. Zargary repeatedly "bang[ed] her head against the wall." *Id.*

When women like Ms. Zargary and Ms. Medina are denied religious accommodation in prisons, they lose an important affirmation of their dignity, modesty, and sense of self. The legal system should offer as much protection as possible for that small sanctuary, ensuring that any denials are not the result of mere ignorance or capriciousness.

II. Congress Passed RLUIPA To Protect The Religious Practices Of Men *And* Women.

A. Some States Protect Female Inmates' Religious Freedoms More Than Others.[2]

Congress passed RLUIPA in 2000 to protect the religious rights of every prisoner everywhere—including people like Ms. Medina and Ms. Zargary. Senators Orrin Hatch and Edward Kennedy, the statute's sponsors, realized prisoners often face difficulties convincing unsympathetic prison officials to accommodate

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[2] For ease of reading, the footnotes in Subsection A.1 reference only state names. The sources for this information are states' publicly posted policies and inmate handbooks—available from counsel—or phone calls with state correctional officials conducted in the past month. Subsection A.2 relies on the Appendix, which contains more detailed citations on states' headscarf policies.

their religious practices: "[Prisoners'] right to practice their faith is at the mercy of those running the institution[s], [and] prison officials sometimes impose frivolous or arbitrary rules. Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways." 146 Cong. Rec. S7775 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy).

RLUIPA protects all inmates—men and women alike. But states vary widely in their approaches to accommodating the religious practices of incarcerated women, especially women of minority faiths. This accommodation gap often correlates with prison officials' exposure to the beliefs in question: female inmates are more likely to face restrictions when their practices are unusual. Requiring prison officials to consider the prison policies of other jurisdictions, as urged by Petitioner, would level the playing field and ensure female inmates' religious practices are protected in every state, as RLUIPA guarantees.

1. Head Coverings. Despite the significance of head coverings for many women of faith, many states forbid female inmates from wearing them. At least sixteen states explicitly prohibit head coverings in prison common areas.[3] *See, e.g.*, Ark. Dep't of Corr., Policy No. 625, *Religious Articles* 1–2 (1998), *available at* http://bit.ly/arpolicy; Or. Dep't of Corr., Policy No. 90.2.4 attach. 1, *Spiritual Property Items for General*

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[3] Alabama, Arizona, Arkansas, Colorado, Idaho, Illinois, Iowa, Massachusetts, Minnesota, Missouri, Montana, New Mexico, Oregon, Rhode Island, South Carolina, and West Virginia.

Population Inmates 1–2 (2012), *available at* http://bit.ly/orpolicy. Some of these states make nods toward accommodation by allowing female inmates to cover their heads during religious ceremonies or in their cells. *See, e.g.*, Idaho Dep't of Corr., Control No. 320.02.01.002, *Property: Religious* 4 (2010), *available at* http://bit.ly/idpolicy. But such an approach still fails to accommodate women whose religious beliefs require them to cover their hair whenever they are in the presence of men.

In contrast, at least twenty-seven states and the federal government have adopted policies allowing religious women to wear head coverings throughout their institutions.[4] *See, e.g.*, Fed. Bureau of Prisons, U.S. Dep't of Justice, Program Statement No. P5360.09, *Religious Beliefs and Practices* 13 (2004), *available at* http://bit.ly/fedpolicy; Tex. Dep't of Criminal Justice, *Offender Orientation Handbook* 15 (2004), *available at* http://bit.ly/tx_policy.

2. Hair Length. Although most states allow female inmates to maintain long hair as a religious practice, several impose specific hair length requirements on female inmates. Arkansas and Virginia, for instance, limit female inmates' hair to shoulder length. Ark. Dep't of Corr., *Inmate Handbook* 8 (18th ed. 2013), *available at* http://bit.ly/arhairpolicy; Va. Dep't of Corr., Operating Procedure No. 864.1, *Offender Grooming and Hygiene* 2 (2013), *available at*

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[4] Alaska, California, Connecticut, Florida, Indiana, Kansas, Kentucky, Maryland, Michigan, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Vermont, Virginia, Washington, Wisconsin, and Wyoming.

http://bit.ly/vahairpolicy. Alabama is even more restrictive, forcing female inmates to cut their hair if it falls below the collar. Ala. Dep't of Corr., *Female Inmate Handbook* 10 (2013), *available at* http://bit.ly/alhairpolicy. These limits on hair length conflict with religious decrees that forbid any cutting of hair.

Such restrictions are also at odds with most states' more accommodating approaches. At least thirty states and the federal government exempt devout female inmates from their hair length policies or place no explicit restrictions on hair length.[5] *See, e.g.*, Fed. Bureau of Prisons, U.S. Dep't of Justice, Program Statement No. 5230.05, *Grooming* 2 (1996), *available at* http://bit.ly/fedhairpolicy; Or. Admin. R. 291-123-0015(2) (2014). Eleven of these thirty states expressly allow female inmates to wear hair of any length.[6] *See, e.g.*, Cal. Code Regs. tit. 15, § 3062(e) (2011). Others, however, have adopted seemingly accommodating but potentially ambiguous grooming policies, such as requiring inmates to keep their hair "neat and clean."[7]

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[5] Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Nevada, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Utah, Washington, and Wyoming.

[6] California, Colorado, Idaho, Illinois, Kentucky, Michigan, Nevada, New Jersey, New Mexico, New York, and Ohio.

[7] Alaska, Connecticut, Delaware, Indiana, Iowa, Kansas, North Dakota, Oklahoma, Oregon, Pennsylvania, and Washington.

See, e.g., Iowa Dep't of Corr., Policy No. IS-SH-01, *Offender Hygiene/Grooming* 3 (2013), *available at* http://bit.ly/iahairpolicy. Unsympathetic prison officials may interpret such policies narrowly, forcing devout women to cut their hair or live in fear at the prospect.

B. States With More Religious Minorities Adopt More Accommodating Policies.[8]

On its face, RLUIPA provides the same religious freedom protections to all prisoners in all states, no matter their sex—as it should. While true differences in prisoner populations and dissimilar requests for religious accommodation may justify disparate policies, prison officials' coincidental familiarity (or lack thereof) with prisoners' religious practices should not factor into their decisionmaking under RLUIPA. Unfortunately, there is evidence to suggest it does.

An analysis of headscarf policies in state prisons serves as a case study in the relationship between a minority religion's visibility and a prison's willingness to accommodate its practices. States with more Muslims are more likely to accommodate female inmates who wish to wear headscarves for religious reasons.

Of the ten states with the largest Muslim populations, eight explicitly allow head coverings for female inmates in common areas while only one prohibits

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[8] The information summarized in this section is cited and documented in more detail in the Appendix.

them—an 8:1 ratio of acceptance versus prohibition.[9] Among the other forty states, however, only nineteen explicitly allow head coverings, while fifteen explicitly forbid them—a 1.26:1 ratio. This correlation between Muslim population and accommodating policies cuts across geographic regions; whether in the Northeast or the South, states with larger Muslim populations are more likely to accommodate headscarves in prison.

These data support reasonable inferences that prison officials in states with significant populations of religious minorities are (a) more exposed to those religions' practices and better able to understand the significance of those practices to their adherents, and (b) challenged to accommodate those religious practices more frequently. States with smaller populations of religious minorities would benefit greatly from considering other states' policies when crafting their own.

C. Considering Alternative Policies Prevents Arbitrary Restrictions On Women's Religious Practices.

This case concerns the amount of deference due to prison officials under RLUIPA's strict scrutiny test, as construed by *Cutter*. The majority approach—adopted

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[9] The ten states with the largest Muslim populations are (in order from highest to lowest) Texas, New York, Illinois, California, Virginia, Florida, New Jersey, Michigan, Pennsylvania, and Georgia. Ihsan Bagby, *The American Mosque 2011*, at 8 (2012), *available at* http://bit.ly/americanmosque. Because the 2010 census did not include a question about religion, this measurement is based on mosques' self-reported levels of attendance during Muslim holy days.

by the First, Second, Third, Fifth, and Ninth Circuits—forbids prison officials from blindly rejecting less restrictive policies (including the proven policies of other states) without actually considering them. *See, e.g.*, *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005). The Eighth and Eleventh Circuits' approach, on the other hand, all but removes the "due" in "due deference," allowing prison officials' conclusory assertions to justify stripping inmates of their right to religious practice.[10] In this case, for example, the Magistrate felt "constrained" by the Eighth Circuit's holding in *Fegans v. Norris*, 537 F.3d 897 (8th Cir. 2008), and forced to defer to officials' reasoning he found "almost preposterous." J.A. 155–56. Because states have wildly inconsistent (and often insufficient) approaches to accommodating minority religious practices despite their importance to many female inmates, WPA supports the majority approach.

Preventing prison officials from rejecting other states' less restrictive policies out of hand is especially critical for female inmates because it would increase the likelihood that female inmates of minority religions can practice their faith in prison. Women constitute a significant but still modest portion of the overall prison population, and female inmates of minority faiths make up an even smaller subpopulation. Female inmates' requests for religious accommodations

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[10] While the Eighth Circuit recently applied RLUIPA less deferentially in *Native American Council of Tribes v. Weber*, No. 13-1401, 2014 WL 1644130 (8th Cir. Apr. 25, 2014), that case appears to be an outlier and is inconsistent with the Circuit's approach in the case below. *See* Pet'r's Br. 53–54.

are thus particularly likely to be novel to prison officials. These officials often do not appreciate the significance of religious practices to the inmates, and they sometimes fail to adequately consider feasible, less restrictive approaches to accommodation. Requiring prison officials to actually consider other jurisdictions' approaches—especially when the inmate provides the information about those approaches—would ensure that female inmates' requests for religious accommodations are not summarily rejected merely because prison officials lack familiarity with the prisoners' beliefs.

CONCLUSION

Religious grooming practices are important for many women, yet these practices are often foreign to prison officials. Requiring those officials to actually consider other states' proven methods of accommodation before approving or denying prisoners' requests would ensure that RLUIPA is applied fairly to all prisoners, everywhere, as Congress intended. The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

STATE PRISON POLICIES ON HEADSCARVES IN GENERAL AREAS

STATE	HEADSCARF POLICY	SOURCE
Alabama	*Prohibited*	Ala. Dep't of Corr., Admin. Reg. No. 333: *Religious Program Services* 7–10 (2014), *available at* http://bit.ly/alpolicy.
Alaska	Allowed, subject to institutional exceptions	Alaska Dep't of Corr., Policy No. 816.1, *Faith-Based Programs and Chaplaincy Services* 2 (2013), *available at* http://bit.ly/akpolicy.
Arizona	*Prohibited*	Ariz. Dep't of Corr., Dep't Order 904, *Inmate Religious Activities/ Marriage Requests* 10 (2011), *available at* http://bit.ly/azpolicy.
Arkansas	*Prohibited*	Ark. Dep't of Corr., Policy No. 625, *Religious Articles* 1–2 (1998), *available at* http://bit.ly/arpolicy.
California*	Allowed	Cal. Dep't of Prisons, *Religious Personal Property Matrix* (2013), *available at* http://bit.ly/ca_policy.
Colorado	*Prohibited*	Col. Dep't of Corr., Reg. No. 800-01, *Religious Programs, Services, Clergy, Faith Group Representatives, and Practices* 10–11 (2014), *available at* http://bit.ly/copolicy.
Connecticut	Allowed	Conn. Dep't of Corr., Directive No. 6.10, *Inmate Property* 17 (2013), *available at* http://bit.ly/ctpolicy.

The ten states with the largest numbers of Muslim residents are underlined. *See* Ihsan Bagby, *The American Mosque 2011*, at 8 (2012).

STATE	HEADSCARF POLICY	SOURCE
Delaware	Probably allowed	Del. Dep't of Corr., Policy No. 5.3, *Standards for Offender Grooming and Attire* 1 (2009), *available at* http://bit.ly/depolicy.
D.C.	*Prohibited*	D.C. Dep't of Corr., Policy No. 4410.1F, *Religious Programs* 7 (2014), *available at* http://bit.ly/washdcpolicy.
Florida	Allowed	Fla. Admin. Code r. 33-602.201(16)(c)(1) (2013).
Georgia	Unknown	
Hawaii	No policy	Telephone Interview with Bruce Spencer, Volunteer Servs. Supervisor, Haw. Dep't of Pub. Safety (May 20, 2014).
Idaho	*Prohibited*	Idaho Dep't of Corr., Control No. 320.02.01.002, *Property: Religious* 4 (2010), *available at* http://bit.ly/idpolicy.
Illinois	*Prohibited*	Ill. Admin. Code tit. 20, § 425.90(d) (2014).
Indiana	Allowed	Telephone Interview with Dave Liebel, Dir. of Religious Servs., Ind. Dep't of Corr. (May 23, 2014).
Iowa	*Prohibited*	Iowa Dep't of Corr., Policy No. OP-RP-01, *Religious Programming* 8–9 (2013), *available at* http://bit.ly/iapolicy.
Kansas	Allowed	Telephone Interview with Gloria Geither, Mentoring Director, Kan. Dep't of Corr. (May 27, 2014).
Kentucky	Allowed	Ky. Corr., Policy No. 23.1, *Religious Programs* 5 (2014), *available at* http://bit.ly/ky_policy.
Louisiana	Unknown	
Maine	Unknown	

STATE	HEADSCARF POLICY	SOURCE
Maryland	Allowed	Telephone Interview with Stephanie Coates, Chief of Religious Servs., Md. Dep't of Pub. Safety & Corr. Servs. (May 22, 2014).
Massachusetts	*Prohibited*	Telephone Interview with Bill Milhomme, Dir. of Volunteer Servs., Mass. Dep't of Corr. (May 23, 2014).
Michigan	Allowed	Mich. Dep't of Corr., Policy Directive No. 05.03.150, *Religious Beliefs and Practices of Prisoners* attach. A, at 1 (2013), *available at* http://bit.ly/mi_policy.
Minnesota	*Prohibited, subject to institutional exceptions*	Minn. Dep't of Corr., Div. Directive 303.020, *Offender Dress/Hygiene/ Hair Care* (2012), *available at* http://bit.ly/mnpolicy.
Mississippi	Allowed	Miss. Dep't of Corr., Statement of Policy 21-03-02-F5, *Allowable Items* (2013).
Missouri	*Prohibited*	Telephone Interview with Doug Warsham, Supervisor of Religious & Spiritual Programming, Mo. Dep't of Corr. (May 22, 2014).
Montana	*Prohibited*	Mont. Dep't of Corr., Procedure No. MSP 5.6.1, *Religious Programming* 3 (2011), *available at* http://bit.ly/mtpolicy.
Nebraska	Allowed	Neb. Dep't of Corr. Servs., Admin. Reg. No. 208.01, *Religious Services* 11 (2013), *available at* http://bit.ly/nepolicy; Telephone Interview with Chuck Glenn, Religion Study Comm. Chair, Neb. Dep't of Corr. Servs. (May 22, 2014).
Nevada	Allowed	Nev. Dep't of Corr., *Religious Practice Manual* 26–28 (2014), *available at* http://bit.ly/nvpolicy.

STATE	HEADSCARF POLICY	SOURCE
New Hampshire	Allowed	N.H. Dep't of Corr., Statement No. 7.17, *Religious Programming (RSA 622:22/23) and Diets* 5 (2013), *available at* http://bit.ly/nhpolicy.
New Jersey	Allowed	E-mail from Matthew Schuman, Pub. Info. Officer, N.J. Dep't of Corr. (May 27, 2014, 3:01:10 PM EDT) (on file with Stanford Law School Religious Liberty Clinic).
New Mexico	*Prohibited*	N.M. Corr. Dep't, Policy No. CD-101301 attach. A, *Religious Groups Overview* 4 (2013), *available at* http://bit.ly/nmpolicy.
New York	Allowed	N.Y. Dep't of Corr. Servs., Directive No. 4202, *Religious Programs and Practices* 6–7 (2009), *available at* http://bit.ly/nypolicy.
North Carolina	Allowed	N.C. Dep't of Corr., *Religious Practices Reference Manual* 22 (rev. ed. 2004), *available at* http://bit.ly/nc_policy.
North Dakota	Allowed	Telephone Interview with Barb McGillivray, Dir. of Women's Servs., N.D. Dep't of Corr. & Rehab. (May 22, 2014).
Ohio	Allowed	Ohio Dep't of Rehab. & Corr., Policy No. 72-REG-12, *Muslim Religious Practices* 4 (2012), *available at* http://bit.ly/ohpolicy.
Oklahoma	Allowed	Okla. Dep't of Corr., Operations Memorandum 030112 attach. B, *Allowable Items—Offender Religious Property Individual Possession* 3 (2013), *available at* http://bit.ly/okpolicy.
Oregon	*Prohibited*	Or. Dep't of Corr., Policy No. 90.2.4 attach. 1, *Spiritual Property Items for General Population Inmates* 1–2 (2012), *available at* http://bit.ly/orpolicy.

STATE	HEADSCARF POLICY	SOURCE
Pennsylvania	Allowed	Pa. Dep't of Corr., Policy No. DC-ADM 819, *Religious Activities* 3–6 (2013), *available at* http://bit.ly/papolicy.
Rhode Island	*Prohibited*	Telephone Interview with Ken Findlay, Prof'l Servs. Coordinator, R.I. Dep't of Corr. (May 27, 2014).
South Carolina	*Prohibited*	Telephone Interview with Tamir Mutakabbir, Muslim Chaplain, S.C. Dep't of Corr. (May 21, 2014).
South Dakota	No policy	Telephone Interview with Aaron Miller, Policies & Compliance Manager, S.D. Dep't of Corr. (May 21, 2014).
Tennessee	Allowed, subject to institutional exceptions	Tenn. Dep't of Corr., Policy No. 118.01, *Religious Programs* 6 (2014), *available at* http://bit.ly/tnpolicy.
Texas	Allowed	Tex. Dep't of Criminal Justice, *Offender Orientation Handbook* 15 (2004), *available at* http://bit.ly/tx_policy.
Utah	No policy	Telephone Interview with Lt. Pei, Dir. of Programming/Volunteer Servs., Utah Dep't of Corr. (Apr. 23, 2014).
Vermont	Allowed	Vt. Dep't of Corr., Directive No. 380.01, *Religious Observance—Facilities* 8 (2008), *available at* http://bit.ly/vtpolicy.
Virginia	Allowed, subject to institutional exceptions	Va. Dep't of Corr., Operating Procedure No. 802.1, *Offender Property* 14–15 (2012), *available at* http://bit.ly/vapolicy.
Washington	Allowed	Wash. Dep't of Corr., *Handbook of Religious Beliefs and Practices* 38 (4th ed. 2012), *available at* http://bit.ly/wapolicy.
West Virginia	*Prohibited*	Telephone Interview with C.J. Rider, Chaplain, W.V. Div. of Corr. (May 21, 2014).

STATE	HEADSCARF POLICY	SOURCE
Wisconsin	Allowed	Telephone Interview with Kelly West, Religious Practices Coordinator, Wis. Dep't of Corr. (May 21, 2014).
Wyoming	Allowed	Wyo. Dep't of Corr., Policy & Procedure No. 5.600, *Inmate Religious Activities* 14–15 (2014), *available at* http://bit.ly/wypolicy.